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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

RALPH NADER,

Petitioner,

v.

ALLEGHENY AIRLINES, INC.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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Ralph Nader, the plaintiff and appellee in the proceedings below, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (Appendix A, *infra*) is reported at 512 F.2d 527. The decision of the district court (Appendix B, *infra*) is reported at 365 F. Supp. 128.

JURISDICTION

The judgment of the court of appeals was entered on May 2, 1975. A timely petition for rehearing, with suggestion for rehearing en banc, was denied by order of the court of appeals entered on June 23, 1975. (Appendix C, *infra.*). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). See *Morse v. United States,* 270 U.S. 151 (1926); *Department of Banking v. Pink,* 317 U.S. 264, 266 (1942); *United States v. Healy,* 376 U.S. 75, 78 (1964).

QUESTION PRESENTED

Whether, notwithstanding a statutory provision preserving common law remedies, the Federal Aviation Act requires that the Civil Aeronautics Board be given the opportunity retroactively to approve fraudulent misrepresentations by an airline that would otherwise constitute actionable torts under state common law, with the effect of extinguishing any private right of action arising from such misrepresentations.

STATUTES INVOLVED

Sections 411 and 1106 of the Federal Aviation Act of 1958, as amended, 49 U.S.C. §§ 1381, 1506, provide:

> Section 411. The [Civil Aeronautics] Board may, upon its own initiative or upon complaint by any air carrier, foreign air carrier, or ticket agent, if it considers that such action by it would be in the interest of the public, investigate and determine whether any air carrier, foreign air carrier, or ticket agent has been or is engaged in unfair or deceptive practices or unfair methods of competition in air transportation or the sale thereof. If the Board shall find, after notice and hearing, that such air carrier, foreign air carrier, or ticket agent is engaged in such unfair or deceptive practices or unfair methods of competition, it shall order such air carrier, foreign air carrier, or ticket agent to cease and desist from such practices or methods of competition.
>
> Section 1106. Nothing contained in this Act shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this Act are in addition to such remedies.

STATEMENT

A. The Facts

This controversy had its origin in April, 1972, when Allegheny Airlines confirmed a reservation for the petitioner Ralph Nader on one of its flights from Washington, D.C. to Hartford, Connecticut. When petitioner arrived at Washington National Airport to board the flight, however, Allegheny's agent told him the flight had been

"oversold" and refused to accommodate him, notwithstanding his ticket and confirmed reservation. As a result, petitioner was unable to reach Hartford in time to fulfill an important speaking commitment on behalf of the Connecticut Citizen Action Group, causing inconvenience and embarrassment to him and even more serious injury to the citizen group, including impairment of its fund-raising efforts.

What Mr. Nader did not then realize was that Allegheny, and most other U.S. scheduled airlines, deliberately "overbook" their flights – *i.e.*, confirm more reserved seats than are actually available on the plane. Allegheny's management employs this practice as a strategy to minimize any potential losses due to "no-shows" and thereby to increase the company's profits. However, the theory that a certain number of passengers will not use their reservations for a particular flight does not always work out in practice, and frequently more people with confirmed reservations arrive to board the plane than can be accommodated. Thus, an inevitable consequence of deliberate overbooking is that some passengers expecting to have their reservations honored for a particular flight are instead "bumped" and left behind. (C.A. App. 123-129).[1] During April, 1972 this happened to some 945 prospective Allegheny passengers – over thirty a day on this one airline.[2]

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[1] "C.A. App." refers to the appendix in the court of appeals, a copy of which is being lodged with the Clerk.

[2] App. B, *infra*, p. B4. The U.S. airline industry as a whole denies boarding each year to approximately 100,000 persons holding
(continued)

Allegheny's practice of deliberate overbooking – and the inevitable bumping of passengers that results – is not something that it has wanted the public to know about. To the contrary, in advertising its services and the availability of reservations for its flights, the company emphasizes reliability and dependability without the slightest warning that denial of boarding may occur due to overbooking. In fact, when it does occur, Allegheny's personnel are instructed by the company manual to tell bumped passengers only that there has been some kind of "mistake" in the reservations, rather than the truth that bumping is a direct consequence of the airline's having deliberately sold more reserved tickets for the flight than the number of seats available. (C.A. App. 220.) Even in correspondence between its top management officials and passengers who have been denied boarding, Allegheny's practice is to attribute oversales to such accidental causes as "human or computer error" rather than forthrightly stating that they are the inevitable result of programmatic

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[2] (continued)
confirmed reservations, according to CAB statistical reports. See, *e.g.*, Civil Aeronautics Board, "Passengers Denied Confirmed Space–Calendar Years 1974 and 1973" (May 7, 1975). For that reason the industry's trade association appeared as *amicus curiae* supporting Allegheny's position in the court of appeals. See *amicus* brief submitted January 25, 1974 in No. 73-2243 on behalf of Alaska Airlines, Inc.; American Airlines, Inc.; Braniff International; Continental Air Lines, Inc.; Delta Air Lines, Inc.; Eastern Air Lines, Inc.; Frontier Airlines, Inc.; Hughes Airwest; National Airlines, Inc.; North Central Airlines, Inc.; Ozark Air Lines, Inc.; Pan American World Airways, Inc.; Northwest Airlines, Inc.; Piedmont Airlines; Southern Airways, Inc.; Texas International Airlines, Inc.; Trans World Airlines, Inc.; United Air Lines, Inc.; Western Air Lines, Inc.; and Wien Air Alaska, Inc.

overbooking.[3] Thus it is hardly surprising that, like most air travelers, the petitioner's understanding when Allegheny said it was reserving space for him, and sold him a ticket based upon that reservation, was that a seat was available and would be held to assure his accommodation on the designated flight.[4] Indeed, as Allegheny's chief executive testified, this is precisely what the company intends the public to expect with a confirmed reservation. (C.A. App. 118.)

B. Proceedings Below

Following the incident at National Airport, petitioner filed suit in the United States District Court for the District of Columbia, seeking recovery of actual and exemplary damages against Allegheny.[5] One basis for this action was a claim of fraudulent misrepresentation by Allegheny in connection with its reservation practices and nondisclosure of overbooking, arising under the common law of the District of Columbia. Jurisdiction over this

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[3] See, *e.g.*, Plaintiffs' Exhibit 14, received in evidence at C.A. App. 17.

[4] Petitioner testified that on two prior occasions other airlines had denied him boarding on flights for which he had reservations, but each time the airline had explained it was accidental rather than the result of intentional overbooking. (C.A. App. 24-25.)

[5] Petitioner was joined in the action by the Connecticut Citizen Action Group. However, that group is not seeking review by this Court of the ruling of the court of appeals setting aside a judgment entered in its favor by the district court.

"state" (*i.e.*, District of Columbia) claim – the only claim involved in this petition – was based on diversity of citizenship, 28 U.S.C. § 1332.[6] In addition the suit contended that Allegheny had violated its duty of non-discrimination under Section 404(b) of the Federal Aviation Act, 49 U.S.C. § 1374(b), by failing to accommodate Mr. Nader in accordance with his reservation priority; federal jurisdiction over the statutory claim was found to exist under 28 U.S.C. §§ 1331 and 1337.[7]

After a trial, the district court found Allegheny liable on both the federal and common law claims, awarding petitioner $10 in compensatory damages and $25,000 in punitive damages. The defendant had argued that Congress assigned to the Civil Aeronautics Board exclusive responsibility to consider the legality and propriety of airline reservations practices, so as to oust the court's common law jurisdiction with respect to such practices. However, its own expert witness on the CAB's jurisdiction and regulatory policies testified that, while the Board had never banned overbooking itself, it expressly recognized and sought to preserve the common law right of overbooked passengers to sue for damages as a result. (C.A. App. 72-73.) Citing that testimony and the CAB's regulations, 14 C.F.R. Part 250, the trial court rejected the contention that its jurisdiction had been preempted. (App. B, *infra*, p. B5.)

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[6] Additionally the district court held that the non-federal claim was properly before it under the pendant jurisdiction doctrine. App. B, *infra*, p. B7.

[7] Petitioner is not seeking review of the portion of the court of appeals' decision remanding the federal statutory claim, but only that part relating to the state common law claim of Mr. Nader.

As to the fraudulent misrepresentation claim, the district court applied the common law definition of that tort under local D.C. law.[8] Allegheny, the court found, holds itself out to the public through advertising and otherwise as offering reliable reservations for its flights which, if confirmed by the airline for a particular flight, will assure the prospective passenger of getting a seat on that flight. (App. B, *infra*, p. B4.) On the other hand, according to the district court's findings, the company is aware that its substantial overbooking practice inevitably results in the denial of boarding to some passengers holding reservations, causing "severe distress and financial loss" to persons relying on such confirmed but dishonored reservations. Yet nothing in Allegheny's advertising makes the public aware of its intentional overbooking practice or the fact that there is "a substantial risk that confirmed reservations will be dishonored."[9] The trial court concluded that Allegheny had knowingly misrepresented a material fact in confirming the plaintiff's reservation, namely that he had a guaranteed reservation for a seat on the flight; that this was actually and reasonably relied on by the plaintiff; and that it resulted in injury to the plaintiff, for which the carrier was

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[8] See *Sankin v. 5410 Connecticut Avenue Corp.*, 281 F. Supp. 524 (D.D.C. 1968), *aff'd, Benn v. Sankin*, 133 U.S. App. D.C. 361, 410 F.2d 1060 (1969), *cert. denied*, 396 U.S. 1041 (1970).

[9] App. B, *infra*, p. B4. These findings of the district court were not disturbed on appeal. The circuit court, however, viewed the case as one involving *nonrepresentation* rather than *misrepresentation*, and reversed a finding by the trial court that Allegheny made any affirmative representation to the plaintiff other than the fact that he had a confirmed reservation. App. A, *infra*, p. A26.

liable. (*Id.*, pp. B7-B8). Because of the knowing and willful nature of the misconduct, and in light of the defendant's responsibilities to the community as a common carrier, its holding out to the public of confirmed reservations to assure accommodation on particular flights, its advertising stressing reliability, and its awareness of the harm likely to occur when passengers are bumped, the court concluded that punitive as well as compensatory damages were in order. (*Id.*, pp. B6, B9).

On appeal, the court of appeals reversed the decision below. While the court's lengthy opinion dealt with many aspects of the litigation, only the part concerning the relation between the common law misrepresentation claim and the CAB's functions under the Federal Aviation Act is relevant to this petition.

Allegheny contended that the CAB has been given exclusive regulatory authority over airline practices, thereby totally preempting the jurisdiction of the courts to consider petitioner's claim for damages arising under the common law. In a last ditch effort to rescue Allegheny from being held liable to the petitioner, the Civil Aeronatuics Board filed an extensive *amicus curiae* brief, essentially repeating the airline's argument that its jurisdiction under Section 411 of the Federal Aviation Act to determine whether particular practices are unfair or deceptive preempted the area.[10]

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[10] The CAB considered this case to be of such significance as to require its appearance as *amicus* some five months after the normal time for filing had passed, well after all other briefing had been completed. This was permitted by the court of appeals over appellees' objection.

In taking the position that the existence of Section 411 completely precludes any right of action for fraudulent misrepresentation under state common law, the Board conceded that it had never used that power to sanction overbooking or deliberate concealment of the practice.[11] Quite correctly, the court of appeals rejected this preemption argument as plainly contrary to the preservation of common law remedies in Section 1106 of the Aviation Act. (App. A, *infra*, pp. A26-A28.)

The court then proceeded, however, to resolve what it perceived as a potential area of conflict between the common law and the regulatory powers vested in the Board, by imposing a solution that had never been suggested by any party or *amicus*, including the Board itself upon which new adjudicative functions were being thrust. The majority, entirely on its own, concluded that the common law damage claim had to be remanded to the district court and stayed pending referral to the CAB to determine whether the practices in question were "unfair or deceptive" within the meaning of Section 411. (*Id.*, pp. A32-A33.) Starting from language contained in this Court's decision in *American Airlines v. North American Airlines*, 351 U.S. 79 (1956), as to the scope and extent of the Board's regulatory powers over the airline industry, combined with an assumption that reservation practices have a significant relationship to rates for air transportation, the circuit court concluded that "the common law remedies for fraud and deceit cannot remain totally unaffected by" the Aviation Act, notwithstanding the plain and contrary language of Section

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[11] Brief for Civil Aeronautics Board As *Amicus Curiae*, pp. 34-35 (June 28, 1974).

1106. Congress, the court reasoned, must necessarily have intended the Board's authority "to include the approval in the public interest of some practices that might be considered common law misrepresentations." (*Id.*, p. A30.) The court went on to rule that, if the Board did in fact exercise its power in this manner:

> The effect of such approval, or a holding that they do not represent deceptive practices, would be to establish that the practices, as a matter of law, do not constitute common law misrepresentations. *(Id.)*

In that event, there could be no right to recover damages in a common law action for misrepresentation as to such practices, the majority held. (*Id.*, p. A31.)

Here, however, it is clear that in fact the CAB has never ruled that any airline's overbooking or related practices are not deceptive, or otherwise should be approved. Yet the circuit court decided that the CAB's approval of airline practices could take place not only on a prospective basis but *retroactively* as well, so as to insulate an airline from common law tort claims for its past conduct. The very enactment of the Aviation Act necessitated such an "alteration of the common law," the court wrote, so that the Board would be able to regulate the industry effectively. (*Id.*) As a result, according to the opinion below, the duty of determining whether any given practice is deceptive or unfair for purposes of common law liability has been reassigned from the courts to the CAB:

> Given this interpretation, when the allegedly tortious practice is one that has been directly regulated by the Board, or while not regulated is so

> obviously tied to a regulated practice or rate that a change in one would require a change in the other, the Board must determine, in the first instance, whether the practice falls within the ambit of the deceptive practices provision of section 411.[12]

The court thus concluded that the judgment in favor of the petitioner had to be reversed and remanded to the trial court, to await a definitive ruling from the CAB as to whether the practices in question were considered to be deceptive within the meaning of Section 411. This was especially called for because, in the court's view, "the problems are as wide as the industry itself, [so] a single, industry-wide resolution is appropriate."[13] The court noted, however, that it might not actually be necessary for the parties to this suit to undertake a new adjudicatory proceeding before the Board. It took judicial notice of a rulemaking proceeding that had been initiated by the Board at the height of the 1973-74 fuel crisis to determine whether that situation necessitated changes in the carriers' reservations practices.[14] The court then expressed its view that that proceeding provides an appropriate forum for the

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[12] *Id.* In footnote 40, omitted from the above quotation, it was noted that a finding of deceptiveness by the Board would not itself establish common law liability, since other elements of the tort would remain to be adjudicated by the court.

[13] *Id.*, p. A32. This, of course, was precisely what the Board had concluded in 1967 it should *not* attempt. See EDR-109 (Jan. 10, 1967) (C.A. App. 152-167).

[14] Emergency Reservations Practices Investigation, EDR-260, CAB Docket 26253.

agency to determine whether or not the practices in question were deceptive under Section 411, in effect directing the agency to proceed with that determination in that proceeding.[15]

Senior Circuit Judge Fahy strongly dissented from this unprecedented holding that, in his words, "now vests the Board with decisional authority to determine that an individual who has suffered injury due to a carrier's fraudulent misrepresentation, and who would otherwise have a common law remedy, would have no such remedy should the Board determine the conduct was not deceptive." (*Id.*, p. A52.) Troubled by the obvious conflict between the court's holding and the express preservation of common law remedies in Section 1106 of the Aviation Act, as well as the realignment of the respective functions of courts and regulatory agencies, Judge Fahy wrote as follows:

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[15] In initiating the Emergency Reservations Practices Investigation on December 21, 1973 – over three months after the district court issued its decision in this litigation – the Board did *not* invoke its powers under Section 411. See CAB Order 73-12-93. That fact and the fact that the CAB's Administrative Law Judge excluded from the record any evidence pertaining to the Allegheny practices at issue in this litigation (Transcript of Hearing, Jan. 31, 1974, CAB Docket 26253, pp. 109-110, 116) seem to have been overlooked by the court of appeals in its assumption – apparently based on suggestions made in an intervening consumer group's brief to the Board that it should prospectively ban overbooking – that the Board will proceed in that investigation to pass upon the legality of those practices. By Order 75-7-54 (July 11, 1975) the Board solicited recommendations from interested parties as to what course of action would be appropriate for it to take in response to the court of appeals' decision.

> . . . the court thus divests itself not only of the authority to adjudicate a claim of fraudulent misrepresentation but also vests the Board with authority to define fraudulent misrepresentation in a manner which the courts must accept for the airline industry. I do not find that Congress has so provided or intended. Indeed, section 1106 seems to me clearly to the contrary. Section 411 affords, or denies, only a statutory remedy, unknown to the common law. (*Id.*)

The adjudication of common law tort claims, in Judge Fahy's view and petitioner's, is a job for the courts alone, entirely independent of the CAB's jurisdiction to control deceptive practices under Section 411 of the Aviation Act. (*Id.*, p. A53.)

REASONS FOR GRANTING THE WRIT

1. **The decision below disrupts the traditional allocation of functions between the courts and the Civil Aeronautics Board, both in the adjudication of private disputes under state law and in the invocation of statutory powers to regulate air transportation, contrary to the Federal Aviation Act and to decisions of this Court.**

Since this Court's decision in *American Airlines v. North American Airlines*, 351 U.S. 79 (1956), it has been clear that the powers of the Civil Aeronautics Board under Section 411 of the Federal Aviation Act are to be exercised only as a means of vindicating the public interest, and not to adjudicate the rights and liabilities of parties in private disputes. As Judge Fahy correctly noted in his dissent, Section 411 "looks only to the future cessation of practices

determined by the Board to be unfair or deceptive," having nothing whatever to do with remedies "for past tortious conduct of a carrier injurious to an individual." (App. A, *infra*, p. A51.) The courts of law, rather than the regulatory agencies charged with the protection of the overall public interest, are available for the resolution of private legal rights against air carriers.[16]

The court of appeals has sharply departed from that rule. Its holding that damages may not be awarded against a regulated airline for its past tortious acts, without first referring the matter to CAB for a ruling as to whether the conduct is deemed unfair or deceptive under Section 411, will deeply affect the historic relationships between federal agencies and courts throughout the nation – not only the federal courts, but state and local courts as well. The decision effectively withdraws from judicial bodies at every level their traditional role in adjudicating private tort claims under both the common law and specific statutes, and reassigns an important part of that job to a federal administrative agency. Yet the circuit court never mentioned and apparently did not even consider the effect its decision would have on these important functional divisions of

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16 See *North American Airlines, supra*, 351 U.S. at 83. We are mindful as well of the Court's recent admonition in *Cort v. Ash*, 95 S. Ct. 2080 (1975), that federal regulatory statutes should not be construed as intruding into those areas traditionally committed to state law, such as the resolution of individual claims for damages, unless essential to their central purposes. See also *Holloway v. Bristol-Myers Corp.*, 158 U.S. App. D.C. 207, 485 F.2d 986 (1973).

responsibilities as between the state and federal courts and the federal regulatory agencies.[17]

Moreover the court of appeals has seriously misconstrued the Board's role under Section 411 as illuminated by this Court's *North American Airlines* decision. The existence of unfair or deceptive practices in the airline industry does not automatically trigger investigations, cease and desist proceedings, or other adjudications before the Board; only when the Board – *not* the court of appeals – makes a specific determination that, in the language of Section 411, it is "in the interest of the public", is the Board authorized to exercise those powers.[18] The decision below simply ignores

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[17] While the particular decision here involves only the airline industry and its relationship to the CAB, the logic of the majority's holding would appear to be equally applicable to other regulatory agencies and other regulated industries. Thus, if the appellate court were correct as to the immunizing effect of a determination by the Board that a particular practice is not deceptive under section 411, a similar determination by the Federal Trade Commission that certain conduct is not deceptive under section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45, would likewise seem to extinguish any common law liability for such conduct. By the same token, the Securities and Exchange Commission would seemingly have authority under sections 10(b) and 14(a) of the Securities Exchange Act, 15 U.S.C. §§ 78j(b), 78n(a), to retroactively sanction and immunize the use of statements in the sale of securities or in proxy materials that would be misleading under state law. In either case, actions in state or federal courts seeking damages for misrepresentation would have to be stayed pending referral to the federal agency –a result certainly hard to square with this Court's decision in *J.I. Case Co. v. Borak*, 377 U.S. 426 (1964), or with the D.C. Circuit's decision in *Holloway v. Bristol-Myers Corp., supra.*

[18] 351 U.S. at 85.

that it is the agency's duty to decide whether and when these powers should be invoked, in effect forcing from the Board an adjudication of whether certain carrier practices should be condemned or approved on an industry-wide basis.

The CAB has long recognized that intentional overbooking may be inherently deceptive and misleading to passengers.[19] It has studiously refrained, however, from finding that the public interest requires it to attempt the detailed regulation and control of overbooking or other airline reservations practices under Section 411. Instead, it has sought to deal with the problem through rulemaking by focusing on the treatment of passengers when oversales occur and by requiring prompt, effective and adequate monetary compensation, in the expectation that this would stimulate the carriers to improve their own reservations systems.[20] That this may not have proved to be a very successful way of dealing with the problem still does not justify the court of

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[19] This view was first expressed in a letter to the industry from the CAB's enforcement office in July 1956, and it has been repeatedly endorsed by the agency. See, *e.g.*, Order E-11658 (Aug. 6, 1957); *Eastern Air Lines Overbooking Enforcement Proceeding*, 30 CAB 862 (1960); *National Airlines Enforcement Proceeding*, 31 CAB 390 (1960); Order E-20859 (May 25, 1964); Regulation ER-503, Enactment of Part 250, p. 3 (Aug. 3, 1967) (C.A. App. 177-205); Regulation ER-880, Amendment of Part 250, 39 F.R. 38087 (Oct. 29, 1974).

[20] ER-503, *supra;* EDR-109, *supra*, Explanatory Statement, p. 2 (C.A. App. 155). The Board specifically noted in issuing its Part 250 regulations that there, "unlike adjudication, we are not evaluating a respondent's past conduct or determining past and present rights and liabilities . . . ." ER-503, p. 4.

appeals in intruding into an issue of regulatory strategy — when to use Section 411 -- by forcing the Board to determine the merits of a particular private dispute.[21]

2. **The decision that the Board may retroactively immunize common law frauds from civil liability is unprecedented and contrary to the statutory limitations on that agency's powers.**

In *Hughes Tool Co. v. Trans World Airlines,* 409 U.S. 363 (1973), the Court held that a private antitrust suit for damages could not proceed where the CAB had asserted jurisdiction over and actually approved the transactions involved. The court of appeals in this litigation has gone far beyond the holding in *Hughes Tool,* however, in asserting that the Board not only has the power to approve airline conduct and thus insulate it from civil liability, but that it may do so *retroactively* – after the injury has already occurred. The court of appeals recognized that its holding on this point involved a fundamental "alteration of the common law," (App. A, *infra,* p. A31) yet it was unable to cite any helpful precedent. The doctrine of

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21 The direction to the Board that it should proceed to decide the "Section 411 issue" being referred to it in the context of the pending *Emergency Reservations Practices Investigation* also clashes with the agency's traditional discretion to control the course of its own proceedings, a discretion that should not be interfered with by the courts except in the most urgent matters. *Utah Agencies v. CAB,* 504 F.2d 1232 (10th Cir. 1974); *City of San Antonio v. CAB,* 126 U.S. App. D.C 112, 374 F.2d 326 (1967); *Frontier Airlines v. CAB,* 349 F.2d 587 (10th Cir. 1965); and see *CAB v. State Airlines,* 338 U.S. 572 (1950).

retroactive agency immunization of torts is indeed unknown to the common law; moreover it seriously misconstrues the CAB's powers and conflicts directly with the preservation of remedies that is explicitly provided for in Section 1106 of the Aviation Act.

Certainly this is not a situation in which the award of damages in a civil action would inherently conflict with the agency's exercise of its jurisdiction and powers.[22] As Judge Fahy correctly pointed out in his dissent, whatever the courts might decide as to particular claims of fraudulent misrepresentation for past conduct, the Board remains free to exercise its statutory authority in accordance with the policies of the Aviation Act. (App. A, *infra,* p. A53.) It is not a situation such as was found in *Ricci v. Chicago Mercantile Exchange,* 409 U.S. 289 (1973), where there was a possible clash between two major federal regimes – in that case the Sherman Act and the Commodity Exchange Act – and where resolution of an essential issue of fact within the agency's special competence might materially aid the court in resolving that clash. Here, as Judge Fahy stated, the issue is simply whether the plaintiff was the victim of a common law tort, a matter well within the competence of courts to decide.

Finally, it is clear that this is not a case like *Hughes Tool* in which the agency has already acted so as to preempt any private damage claims. The Board has quite

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22 Thus, it is unlike such cases as *Texas & Pacific Ry. Co. v. Abilene Cotton Oil Co.,* 204 U.S. 426 (1907), and *Danna v. Air France,* 463 F.2d 407 (2d Cir. 1972), where an essential issue in the case (*e.g.,* the reasonableness of tariff rates) can only be decided by the agency.

plainly taken no action to sanction any airline's conduct or grant immunity for it from civil liability. Instead its consistent approach has been to *avoid* assertion of its regulatory powers over the airlines' reservations practices, leaving that field open to what it hoped would be informed and enlightened management discretion.[23] At the same time, the Board has repeatedly made clear its intention to preserve the common law remedies of persons who are denied boarding, as an alternative to the optional liquidated damages remedy provided in its Part 250 regulations.[24]

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23 The Board in deciding upon this approach observed:

> Moreover, the reservations practices of the carriers involve detailed methods of doing business, personnel supervision, use of equipment, adaptation to technological change, etc., requiring a high degree of management flexibility and freedom. Since these matters are within the special province and competence of carrier management, it is desirable that the Board attempt to minimize to the extent possible regulation of the details of the carriers' reservations systems. But by the same token, it is incumbent on the carriers themselves to take effective steps to curb oversales resulting from their reservations practices. EDR-109, *supra*, p. 7. (C.A. App. 160.)

The Board's judgment to refrain from intruding into the details of airline reservations practices is consistent with the fairly limited regulatory role envisaged for it by Congress, as evidenced by the explicit withholding of authority to govern carrier schedules, equipment, accommodations and facilities under Section 401(e)(4) of the Aviation Act, 49 U.S.C. § 1371(e)(4). The circuit court's assumption that the Board has plenary regulatory powers over anything that might affect airline rates overlooks this important aspect of the statutory scheme.

24 This policy was most recently reaffirmed in June, 1973, when the Board explained that under Part 250 bumped passengers "are

(continued)

Thus the choice by Mr. Nader to pursue his common law damage claim for fraudulent misrepresentation by Allegheny, and the ruling in his favor by the trial court, were in no way in conflict with CAB policy or regulations but indeed were entirely consonant with them.

The question presented on this petition is whether the court of appeals was correct in reversing the trial court's judgment that a common law tort had occurred, and remanding solely to allow the regulatory agency an opportunity to extinguish petitioner's right of action retroactively. Even assuming, as the court of appeals did, that the Board could ever approve common law misrepresentations,[25] the notion that it could do so to immunize an airline's past misconduct is plainly wrong. Certainly nothing in *Hughes Tool* or any other decision of this Court

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24 (continued) given the option to either accept denied boarding compensation as liquidated damages for all damages incurred by the passenger as a result of the carrier's failure to provide him with confirmed reserved space, or to pursue their remedy under the common law." EDR-248, Notice of Proposed Rule Making, 38 F.R. 15083 (June 8, 1973).

25 App. A, *infra*, p. A30. It is hard to imagine how the Board, consistent with the purposes of the Federal Aviation Act and specifically Section 411, could ever be justified in authorizing deliberate carrier misrepresentations that deceive the public. Even where the CAB has been given specific statutory authority to exempt conduct from civil liability under the antitrust laws, at least one court has held that such power could not be used to sanction predatory conduct in the nature of active misrepresentations. *Aloha Airlines, Inc. v. Hawaiian Airlines, Inc.*, 489 F.2d 203, 211-212 (9th Cir. 1973), *cert. denied*, 417 U.S. 913 (1974).

lends support to that holding.[26] It is, moreover, squarely in conflict with Section 1106 of the Aviation Act, which specifically preserves common law remedies so long as they are not fundamentally repugnant to the duties of the CAB.

CONCLUSION

A central purpose of the Aviation Act is the elimination of deceptive practices in the airline industry. Yet the circuit court's decision turns the Act on its head by erecting an enormous new barrier to common law recovery for those very practices. The court's holding that the CAB's regulatory jurisdiction may be invoked to extinguish retroactively a common law right of action is wholly unprecedented, and in plain conflict with the statutory preservation of common law remedies, as weli as the CAB's own regulatory pronouncements. This sweeping decision, which embraces principles of law that were never briefed or argued, not only disrupts traditional relationships between state and federal courts and agencies and interferes with common law remedies, but it imposes additional, potentially enormous burdens on the agency (or agencies) which will be affected by it. And neither Allegheny nor the CAB – the agency on which this mandatory funnelling of every federal and state case arguably within its sphere of authority would be imposed – ever suggested or endorsed the result reached by

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[26] Under the CAB's own *Sherman* doctrine, the Board will not give retroactive approval to illegal relationships with and between air carriers except in emergency and *de minimis* situations. *Sherman, Control and Interlocking Relationships*, 15 CAB 876 (1952).

the court of appeals. All of these factors, we submit, demonstrate the need for review of the case by this Court.

Respectfully submitted,

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September 22, 1975

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Ralph NADER et al.

v.

ALLEGHENY AIRLINES, INC., Appellant.

No. 73-2243.

Argued Dec. 10, 1974.

Decided May 2, 1975.

* * * * *

Before FAHY, Senior Circuit Judge, and McGOWAN and TAMM, Circuit Judges.

* * * * *

TAMM, Circuit Judge:

Plaintiffs-appellees Ralph Nader and the Connecticut Citizen Action Group (CCAG) brought this suit in district court against defendant-appellant Allegheny Airlines, Inc. (Allegheny) after Allegheny dishonored Nader's reservation for one of its flights. Appellees alleged that as a consequence of Allegheny's actions, Nader was unable to appear at a fund-raising rally in behalf of CCAG, thereby causing the loss of $100,000 in contributions. Appellees claimed that the incident gave rise to a private damage remedy for unjust discrimination under section 404(b) of the Federal Aviation Act of 1958, 49 U.S.C. § 1374(b) (1970) and that Allegheny's failure to disclose the risk of being denied a seat constituted fraudulent misrepresentation. They sought compensatory damages for lost contributions, and for various out-of-pocket expenses, and punitive damages of

$150,000. After a non-jury trial, the district judge entered judgments for Nader on the section 404(b) claim and for both appellees on the claim of fraudulent misrepresentation. He assessed compensatory damages of $10 for Nader and $51 for CCAG and also awarded $25,000 punitive damages to each appellee. Nader v. Allegheny Airlines, Inc., 365 F.Supp. 128 (D.D.C.1973). Allegheny appeals the decision of the district court both with respect to liability and damages. The Air Transport Association of America, on behalf of certain of its members, and the Civil Aeronautics Board (the Board) have submitted briefs as amicus curiae.

Parts I and II of this opinion discuss the facts that led to the suit and the pertinent regulatory background. In part III, we first conclude that the trial judge's holding that Nader can recover under section 404(b) of the Act must be reversed and remanded because his findings of fact appeared tainted by erroneous legal conclusions. We next hold that the finding that Allegheny committed fraudulent misrepresentation must be reversed and the case stayed until the Board determines whether the airlines' reservation practices are deceptive. Lastly, we conclude even assuming *arguendo* that Allegheny committed fraudulent misrepresentation, CCAG is not within the class that can recover. In part IV, we hold that punitive damages may not be awarded for a section 404(b) violation based on the record in this case. We also hold that while punitive damages ultimately may be assessed against Allegheny for fraudulent misrepresentation, the trial judge must consider whether Allegheny was relying upon the belief that its actions carried the approval of the Board, and therefore was acting in good faith.

I. FACTS

Early in April, 1972, Ralph Nader, a well-known consumer advocate, agreed to make several appearances on behalf of CCAG, a Connecticut public interest corporation.[1] Nader's two principal appearances, designed to attract contributions and other support for CCAG, were scheduled for April 28, 1972–the first, a noontime rally in downtown Hartford, and the second at the Storrs campus of the University of Connecticut.[2]

On April 25, Nader reserved a seat for April 28, on Allegheny Airlines flight 864, which was scheduled to leave Washington at 10:15 a.m. and to arrive in Hartford at 11:15 a.m. On the morning of April 28, Nader's ticket was purchased from a travel agency and he departed for National Airport. Arriving at 10:05 a.m., Nader immediately proceeded to gate 17, the boarding and check-in area. Although Nader arrived at gate 17 approximately five minutes before the scheduled departure of flight 864, Allegheny's agent informed him that the flight was full and he could not be accommodated.[3] Nader told the agent of his imminent speech in Hartford and of the importance of his getting on the plane. The agent replied that the plane was full and that he (the agent) could not do anything about it. Nader then asked the agent to see if any standby passengers had been boarded or if anybody already on board was willing to give up his seat. The agent again

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[1] Transcript of District Court Proceedings, September 4, 1972, Civ.No. 1346-72 at 15-16 (hereinafter Transcript).

[2] *Id.* at 16, 42.

[3] *Id.* at 17-19.

replied that he was sorry but the plane was full and he could not do anything about it.[4]

Two other persons who had arrived ahead of Nader but after the plane was fully loaded were also denied boarding.[5] As was Allegheny's practice, the agent checked to determine the availability of suitable alternative transportation. He suggested the possibility of taking an Allegheny-sponsored air taxi to Philadelphia, where connections with an Allegheny flight scheduled to arrive in Hartford at 12:15 p.m. could be obtained.[6] While this alternative was acceptable to the two other passengers who had been denied boarding on flight 864, Nader rejected it. The connection was difficult to make as the air taxi was scheduled to arrive only ten minutes before departure of the Philadelphia-Hartford flight. If the connection were missed, Nader would not make his Storrs appearance as well as the one in Hartford. Moreover, Nader believed that in any event the 12:15 p.m. arrival might have been too late to salvage the Hartford rally. Therefore, he elected to fly to Boston, where he was met by a CCAG staff-member and driven to Storrs, arriving there at 2:30 p.m., approximately thirty minutes later than planned.[7]

As a consequence of Nader's failure to obtain a seat on flight 864, Nader and CCAG filed this suit, claiming compensatory damages for extra travel expenses and phone calls, lost contributions caused by Nader's failure to speak at the Hartford rally, and substantial punitive damages.

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[4] *Id.* at 18-21.

[5] *Id.* at 173-75.

[6] *Id.* at 21, 177-78.

[7] *Id.* at 21-26.

The trial judge awarded Nader and CCAG compensatory damages for their incidental expenses,[8] denied CCAG's claim for lost contributions as too speculative,[9] and awarded each appellee $25,000 in punitive damages. Nader v. Allegheny Airlines, Inc., *supra.* Allegheny has vigorously objected to the trial judge's findings as to liability and damages.

II. BACKGROUND

It is uncontroverted that Allegheny dishonored Nader's confirmed reservation because it had accepted more reservations for flight 864 than it had seats. This practice, in industry parlance, is known as overbooking. While sometimes inadvertent, the overwhelming majority of air carriers deliberately overbook certain flights.[10]

Deliberate overbooking is a response to several problems that have plagued the industry. The present reservation system offers maximum flexibility to the public. Reservations

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[8] The trial judge awarded Nader $10 in actual damages, which consisted of $7 for long-distance telephone calls and $3 for the additional cost of a ticket to Boston. CCAG was awarded $50 for the expense of sending a car to Boston to transport Nader to Storrs, Connecticut. Nader v. Allegheny Airlines, Inc., 365 F.Supp. 128, 130 (D.D.C. 1973).

[9] The trial judge awarded CCAG $1 for the invasion of its legal rights. CCAG has not appealed from the district court's refusal to award damages for lost contributions. *Id.* at 133.

[10] Initial Decision, CAB Docket No. 26253, Emergency Reservation Practices Investigation, at 10 (June 10, 1974). *See also* Brief of Certain Members of the Air Transport Association of America as Amicus Curiae, at 5-6.

may be cancelled and changed with impunity and passengers are not generally penalized for missing a flight even though the seat cannot be filled.[11] As might be expected, this system results in a substantial reservation turnover before the flight departs.[12] Moreover, the industry must absorb the lost revenues caused by the "no-show" problem; some members of the air traveling public abuse the system by making single or multiple reservations that they never use and fail to cancel.[13] Other passengers who fully intend to use their reservations or intend to cancel are unable to do so through no fault of their own.[14] Lastly, empty seats may be carrier generated through computer or human error.[15] By studying a flight's history, air carriers are often able to predict with accuracy the reservation

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11 Initial Decision, CAB Docket No. 26253, *supra* note 10, at 8-9:

> The successful growth and development of air transportation has been aided in significant measure by the flexibility of the industry's reservation practices and procedures which make airline services easily available to the public. The airline passenger has substantial freedom of choice to make reservations at carriers' offices or through agents and to cancel them by telephone or in person. Also, should a ticketed passenger have a change of plans, he is free in most situations to use his ticket on flights of other air carriers without endorsement.

12 *See* Priority Rules, Denied Boarding Compensation Tariffs, And Reports Of Unaccommodated Passengers: Notice of Proposed Rule Making, CAB Docket No. 16563, 32 Fed.Reg. 459, 460 (CAB Order EDR-109, 1967).

13 *Id.*

14 Initial Decision, CAB Docket No. 26253, *supra* note 10, at 9.

15 *Id.*

turnover and the number of no-shows. Through controlled overbooking based on statistical analysis of these historical studies, air carriers can reduce the chance that a fully-booked aircraft will depart with empty seats. Thus, the flexible reservation system functions with reasonable efficiency, passengers who would not otherwise be accommodated on the flight of their choice can make confirmed reservations, and carriers increase their load factor.[16]

Nevertheless, the practice of deliberate overbooking is far from perfect. Inevitably, there are instances in which more persons holding confirmed reservations appear for a flight than are predicted, and somebody must be denied boarding, or more commonly "bumped." The airline industry refers to this as an oversale situation. Although in statistical terms the number of oversales is small – 5.4 oversales per 10,000 enplanements in 1972, and only 4.6 in 1973,[17] in absolute terms the number is substantial. Nearly 83,000 persons were bumped in 1972, and approximately 76,000 in 1973.[18] Obviously, inconvenience and hardship can and do occur when persons who expect to board a flight cannot do so.

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16 *See* Priority Rules, Denied Boarding Compensation Tariffs, And Reports Of Unaccommodated Passengers: Notice of Proposed Rule Making, *supra* note 12, 32 Fed.Reg. at 460.

17 Brief for Civil Aeronautics Board As Amicus Curiae, Appendix B, at 50.

18 *Id.* Allegheny's statistics are in line with the industry average. In 1972, over 6300 persons were bumped on Allegheny flights, for a ratio of 6.3 oversales per 10,000 enplanements. In 1973, slightly less than 4800 persons were bumped, for a ratio of 4.5 oversales per 10,000 enplanements. *Id.* at 60-61.

The Civil Aeronautics Board has been cognizant of the no-show problem and of the benefits and detriments occasioned by the practice. Twice in the last twenty years, the Board has approved experiments that included penalties, service charges, ticketing time limits, and reconfirmation requirements. Although these policies reduced the incidence of no-shows, they caused customer resentment and ill-will. Parts of the program were found to be unenforceable, and these efforts were abandoned.[19] However, the Board remained interested in the area.[20]

The Board's current response to overbooking arose from a complaint filed by its Enforcement Bureau against National Airlines. The complaint charged, *inter alia*, that National's policy of deliberate overbooking was a deceptive practice and an unfair method of competition within the meaning of section 411 of the Federal Aviation Act, 49

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19 Initial Decision, CAB Docket No. 26253, *supra* note 10, at 2-3; Emergency Reservation Practices Investigation: Order Instituting Investigation; Tentative Findings and Conclusions; and Notice of Proposed Rule Making, CAB Docket No. 26253, 39 Fed.Reg. 823, 824 (1974).

20 *See* Priority Rules, Denied Boarding Compensation Tariffs, And Reports Of Unaccommodated Passengers: Notice of Proposed Rule Making, *supra* note 12, 32 Fed.Reg. at 460. Even before the Board began to deal comprehensively with the problem through rule making, it had issued a number of orders that demonstrate its awareness of the nature of the overbooking problem. *See generally* CAB Order E-20859 (May 25, 1964); CAB Order E-18268 (April 27, 1962); CAB Order E-17914 (January 8, 1962); CAB Order E-15615 (August 4, 1960); CAB Order E-12817 (July 22, 1958); CAB Order E-12025 (December 16, 1957); CAB Order E-11658 (August 6, 1957); CAB Order E-11007 (February 6, 1957); CAB Order E-10545 (August 17, 1956); CAB Order E-9194 (April 29, 1955).

U.S.C. § 1381 (1970). In National Airlines, Inc., Enforcement Proceeding, 31 CAB 390 (1960), the Board dismissed this part of the complaint, stating:

> Our determination to dismiss this proceeding insofar as it relates to overbooking is based solely on our finding, on review of the record, that the present forum is . . . too limited to permit an informed, overall appraisal of the problems and the conflicting policy considerations involved . . . On this limited record, we are unable to appraise the scope or seriousness of these problems, and we have no information as to what other carriers have done by way of finding solutions, either similar to, or different from, that of the respondent.
>
> We shall promptly institute an industry-wide investigation, which will provide a sound factual basis for the development of Board policy with respect to overbooking.

31 CAB at 392 (footnote omitted).

On the same day the Board announced its decision in *National Airlines*, it also instituted Docket 11683, Overbooking Practices of Trunkline Carriers Investigation (CAB Order E-15615, August 4, 1960). A number of carriers participated in this investigation, and a draft report was issued. *See* CAB Order E-20859 (May 25, 1964). On October 12, 1965, the Board issued a notice of proposed rule making in which it proposed to formulate an overbooking policy. Passenger Priorities And Overbooked Flights: Notice of Proposed Rule Making, 30 Fed. Reg. 13236 (CAB Order EDR-95,

1965). The Board's view at that time, as expressed in the explanatory statement accompanying the proposed rules, was that payment to compensate passengers was *not* a satisfactory solution, and that:

> The protection of the travelling public requires that carriers give passengers with reserved space an adequate and reasonably timely notice where, as a result of an overbooked condition and under priority rules, they would be denied boarding if all passengers with higher priority boarded the flight.

Id. The Board proposed that at a minimum, the carriers be required to give notice of an overbooked condition twelve hours prior to the scheduled departure of the flight. *Id.* at 13236-37.

Early in 1967, the Board instituted another proposed rule making, one which embodied the rules that form the core of the economic regulations that currently govern air carrier overbooking practices. Priority Rules, Denied Boarding Compensation Tariffs, And Reports of Unaccommodated Passengers: Notice of Proposed Rule Making, 32 Fed.Reg. 459 (CAB Order EDR-109, 1967). In its explanatory statement accompanying the proposed rules, the Board repudiated its 1965 position that carriers be required to give passengers notice of overbooked conditions. Among the reasons cited for withdrawing the earlier proposed rule were that it would create anxiety and confusion in the public, would cause the public to make a great number of duplicative and protective reservations, would produce a rapid turnover in reservations within the twenty-four hours before the departure of a flight, and would increase the no-show problem. *Id* at 460. Moreover, the

Board concluded that disclosure would force the carriers to terminate deliberate overbooking and to change their reservation practices substantially. *Id.* at 461. It was unwilling to put an end to deliberate overbooking because of its view that overbooking, while causing oversales, "also contributes to flexibility and freedom in securing, changing, and cancelling reservations." *Id.*

The Board recognized, however, its obligation to insure that oversales were reduced to a minimum and to find a solution that would accommodate the needs of the public and the industry. It noted that "[w]ith respect to the reservations practices of the carriers responsible for oversales, however, we conclude that these practices must either be regulated by the Board or that the denied boarding passengers be offered reasonable compensation." *Id.* The Board chose the latter alternative. In CAB Order ER-503, 32 Fed.Reg 11939 (1967), the Board adopted, with minor modifications, the rules it had proposed earlier in 1967, in CAB Order EDR-109. These rules were designed to implement the Board's still current position that the interest of the public and the industry are each best served by continuing the present reservation practices, allowing the air carriers to continue their practice of deliberate overbooking, but forcing them to eliminate the worst abuses.

Embodied in 14 C.F.R. §§ 250.1 et seq., the regulations require carriers to file priority rules with the Board to determine who shall be denied boarding on an oversold flight[21]

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[21] § 250.3 Priority Rules.
Every carrier shall establish priority rules and criteria for
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and to file denied boarding compensation tariffs.[22] Compensation, generally the price of a one-way ticket to the passenger's first destination,[23] must be provided if the carrier cannot transport the passenger to his ultimate destination within two hours of the scheduled arrival time of the

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21 (continued)
determining which passengers holding confirmed reserved space shall be denied boarding on an oversold flight. Every carrier shall file with the Chief, Passenger and Cargo Rates Division, Bureau of Economics, two copies of such rules and criteria, including that portion of its company manual instructing employees on the order of boarding priorities in case of an oversold flight. Such rules and criteria shall not make, give or cause any undue or unreasonable preference or advantage to any particular person or subject any particular person to any unjust discrimination or any undue or unreasonable prejudice or disadvantage in any respect whatsoever.

22 § 250.4 Filing of denied boarding compensation tariffs.

Subject to the exceptions provided in § 250.6, every carrier shall file tariffs providing compensation to a passenger holding confirmed reserved space who presents himself for carriage at the appropriate time and place, having complied fully with the carrier's requirements as to ticketing, check-in and reconfirmation procedures and being acceptable for transportation under the carrier's tariff, and the flight for which the passenger holds confirmed reserved space is unable to accommodate the passenger and departs without him.

23 § 250.5 Amount of denied boarding compensation.

Subject to the exceptions provided in § 250.6, the tariffs required by this part shall provide for compensation to be paid a passenger holding confirmed reserved space, as described in § 250.4, at the rate of 100 percent of the value of the first remaining flight coupon with a $25 minimum and a $200 maximum.

original flight.[24] The regulations also mandate that the carriers tender to each oversold passenger a written explanation of "the terms, conditions and limitations of the denied boarding compensation."[25] Lastly, carriers must file monthly reports of their oversale experience with the Board.[26]

The effect of these regulations is to eliminate the potential for abuse in three important ways. First, denied boarding compensation rules insure that as a practical matter the carriers will not engage in excessive overbooking. Since compensation equal to the value of a ticket must ordinarily be paid to an oversale, it is uneconomic for carriers to continuously accept so many reservations that they regularly leave passengers stranded. Second, if the flight is oversold, carriers must follow predetermined procedures for deciding which passengers will be denied boarding. Lastly, requiring the carriers to give the oversold passenger a written explanation of his rights should act as a deterrent to mistreatment.

These rules have remained in effect from 1967. However, the Board recently became concerned that the cutbacks in service begun in November, 1973 because of the Arab oil embargo would cause an increase in the no-show problem and would undermine the present reservation system. Therefore in CAB Order EDR-260, the Board gave notice of a proposed rule making and instituted Docket

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24 14 C.F.R. § 250.6(b) (1974). Section 250.6 also contains other exceptions not relevant here.

25 *Id.* § 250.9 (1974).

26 *Id.* § 250.10 (1974).

26253, Emergency Reservation Practices Investigation, 39 Fed.Reg. 823 (1974). The Board proposed to establish ticketing time limits to retain confirmed reservations, impose refund penalties on no-show passengers, and increase denied boarding compensation by 300 per cent. Government, industry, and consumer interests are all represented in this proceeding, which is currently pending before the full Board after an initial decision by the administrative law judge.

In sum, the position of the Board, which is presently being re-evaluated, is that the practice of deliberate overbooking in combination with the carriers' present reservation practices is in the public interest. However, to protect those persons who are denied boarding because of deliberate overbooking, a scheme of reasonable compensation is required. This background becomes especially relevant in considering the misrepresentation issue.

III. LIABILITY

A. *The Implied Private Damage Remedy for Violations of Section 404(b) of the Federal Aviation Act.*

Nader's first cause of action was predicated upon section 404(b) of the Federal Aviation Act of 1958, 49 U.S.C. § 1374(b) (1970), which provides, *inter alia*, that an air carrier may not unreasonably prejudice or unjustly discriminate against any person.[27] While the matter is not

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[27] 49 U.S.C. § 1374(b) (1970) provides:

> No air carrier or foreign air carrier shall make, give, or (continued)

free from doubt, the trial judge apparently held that only Nader could recover on this theory.[28]

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[27] (continued)
> cause any undue or unreasonable preference or advantage to any particular person, port, locality, or description of traffic in air transportation in any respect whatsoever or subject any particular person, port, locality, or description of traffic in air transportation to any unjust discrimination or any undue or unreasonable prejudice or disadvantage in any respect whatsoever.

[28] The district court's holding on this contention was: "The Plaintiff, Mr. Nader, is entitled to both compensatory and punitive damages under the antidiscrimination provisions of the Federal Aviation Act of 1958, Section 404(b), 49 U.S.C. § 1374(b)." Nader v. Allegheny Airlines, Inc., *supra*, 365 F.Supp. at 132 (D.D.C. 1973). However, the district court's holding on the second claim, that of fraudulent misrepresentation, was that both appellees could recover. *Id.* at 132-33. Therefore, we must conclude that the trial judge's failure to mention CCAG with respect to the implied private action arising from a violation of section 404(b) means that appellee CCAG failed to meet its burden of proof on this issue. *See* Switzer Bros., Inc. v. Locklin, 297 F.2d 39, 45 (7th Cir. 1961), cert. denied, 369 U.S. 851, 82 S.Ct. 934, 8 L.Ed.2d 9 (1962). Appellees appear to accept this interpretation of the district judge's decision as their first argument is captioned "[t]he trial court's finding that Allegheny unreasonably discriminated against *the plaintiff Nader* was not 'clearly erroneous'," while their second argument is premised by the statement: "The finding that Allegheny has engaged in fraudulent misrepresentations which caused injury to *plaintiffs* was not 'clearly erroneous'." Appellees' Br. at 16, 24 (emphasis supplied). Moreover, appellees have not argued in their brief that CCAG could recover on this claim. Despite appellant's contention that if the issue remains in the case CCAG cannot recover, we see no reason to give it further consideration.

[1, 2] Although the Act does not provide for private enforcement of section 404(b), it is well settled that a private damage action is available to remedy violations of this provision. *See, e.g.*, Fitzgerald v. Pan American World Airways, Inc., 229 F.2d 499 (2d Cir. 1956); Wills v. Trans World Airlines, Inc., 200 F.Supp. 360 (S.D.Cal.1961). However, the elements of the cause of action and the litigant's evidentiary burdens are less certain. The trial court's opinion does little to clarify the confusion, and much of the parties' argument on appeal is addressed to the scope of its holding. Allegheny's deceptively simple position is that Nader failed to prove the elements of his cause of action. To adopt this position would dictate that we ignore the trial court's opinion and review the evidence *de novo*. This we cannot do. Nader argues that he established a *prima facie* case of discrimination; thereafter, Allegheny carried the burden of introducing rebuttal evidence. Nader maintains that Allegheny was unable to meet this burden, *that the trial judge so found*, and that his finding is not clearly erroneous.

[3-5] Before reaching the parties' contentions, we must determine the elements of an actionable section 404(b) violation as applied to oversales. In Archibald v. Pan American World Airways, Inc., 460 F.2d 14 (9th Cir. 1972), the Ninth Circuit held that the practice of overbooking does not *per se* give rise to an actionable section 404(b) violation. We agree with that conclusion. Carriers must be given a reasonable opportunity to ameliorate the loss of revenue occasioned by the no-show problem. Moreover, whether intentional overbooking is a reasonable response

to that problem must be determined, in the first instance, by the Civil Aeronautics Board. This result is mandated by the doctrine of primary jurisdiction, which permits the agency to which Congress has delegated its regulatory power to determine whether a rule or practice is unreasonable or unjustly discriminatory, subject to the limitations generally imposed by judicial review of agency action. *See, e.g.*, Danna v. Air France, 463 F.2d 407 (2d Cir. 1972).

[6-8] Even if overbooking is not a *per se* section 404(b) violation, the determination of which passengers will be denied boarding presents the possibility for abusive and discriminatory actions. Therefore, each carrier is required by section 250.3 of the Board's economic regulations, 14 C.F.R. § 250.3, to establish and enforce nondiscriminatory priority rules for making this decision. Obviously, a carrier's violation of its own *prima facie* nondiscriminatory priority rules is the type of conduct that section 404(b) was designed to prevent. Several courts have specifically found that a carrier's violation of its priority rules gives rise to a section 404(b) cause of action. Kaplan v. Luthansa German Airlines, 12 Avi. Par.17,933 (Civil No. 68-2611, E.D. Pa. April 9, 1973); Mortimer v. Delta Air Lines, Inc., 302 F.Supp. 276 (N.D.Ill. 1969); Wills v. Trans World Airlines, Inc., *supra*. *See also* Stough v. North Central Airlines, Inc., 55 Ill.App.2d 338, 204 N.E.2d 792 (1965). We find their reasoning persuasive. Nevertheless, defining the elements of the cause of action with respect to overbooking, namely (1) that the plaintiff possessed a designated priority, and (2) that the carrier boarded persons with a lower priority, does not end our inquiry. Although a plaintiff generally carries the burden of persuasion on each element of his

cause of action, special circumstances may lead a court to shift the burden of persuasion to the defendant on some part of the claim. One special circumstance commonly accepted is that the burden will be shifted where the material necessary to prove or disprove an element "lies particularly within the knowledge" of the defendant. International Harvester Co. v. Ruckelshaus, 155 U.S.App.D.C. 411, 478 F.2d 615, 643 (1973); *see* Campbell v. United States, 365 U.S. 85, 96, 81 S.Ct. 421, 5 L.Ed.2d 428 (1961). We think that this exception must be applied to the case *sub judice:* Once the plaintiff proves that the carrier failed to honor his priority, the burden of proving the priority rules and compliance therewith shifts to the carrier. *Accord,* Archibald v. Pan American World Airways, Inc., *supra.*

Several considerations compel this result. The responsibility for promulgating and adhering to priority rules is delegated to the carriers by the Board, and the decision concerning which passengers will be denied boarding is solely within the carriers' control. Generally, any documents relating to the incident itself, its causes, and its resolution will be in the carrier's possession and the carrier will be in a better position to develop any needed documentation. Moreover, if the documents are difficult to discover, or if the carrier has not made and kept records, a plaintiff with a meritorious case would be unable to prosecute his action through no fault of his own. Thus, it makes sense from every perspective to place the burden on the carrier of showing how the priority rules legitimized its action.

[9-11] The remaining issue is whether under the principles set forth above, the trial judge properly found that Nader established his right to recovery. We recognize that

we are bound to accept the findings of fact of the trial judge unless they are clearly erroneous. *See, e.g.,* Case v. Morrisette, 155 U.S.App.D.C. 31, 475 F.2d 1300, 1306-07 (1973). However, findings that an appellate court believes were induced by an erroneous interpretation of law are not sheltered by the clearly erroneous standard. *See* United States v. Singer Manufacturing Co., 374 U.S. 174, 194 n. 9, 83 S.Ct. 1773, 10 L.Ed.2d 823 (1963); Case v. Morrisette, *supra,* 475 F.2d at 1307; Rowe v. General Motors Corp., 457 F.2d 348, 356 n. 15 (5th Cir. 1972). Moreover, while findings of fact need not be in any particular form, they must provide sufficient guidance for the appellate court to identify the basis of the decision. *See* Russo v. Central School District No. 1, 469 F.2d 623, 628-29 (2d Cir. 1972), cert. denied, 411 U.S. 932, 93 S.Ct. 1899, 36 L.Ed.2d 391 (1973); Alpha Distributing Co., Inc. v. Jack Daniel Distillery, Lem Motlow, Prop., Inc., 454 F.2d 442, 453 (9th Cir. 1972).

In the case *sub judice,* the trial judge made the following finding which, although placed with his conclusions of law, embodies the inferences drawn from the incident and contains the application of the law to the relevant facts:

> Mr. Nader has established a *prima facie* case of unreasonable discrimination: He possessed a confirmed reservation and ticket, and the resultant right to a seat. The Defendant, who intentionally over-sold the seats, did not honor that priority. *The Defendant has failed to sustain its burden of proof that the discrimination was reasonable by demonstrating company policy and why, in this particular case, its policy did not work an "undue or unreasonable prejudice or disadvantage in any respect whatsoever" to*

> *Mr. Nader, where the Defendant permitted passengers with subsequent or no reservations to have priority over a passenger with a confirmed reservation who had not been informed of the risks attendant to the Defendant's concealed policy of over-booking.*

Nader v. Allegheny Airlines, Inc. *supra*, 365 F.Supp. at 132 (citations omitted).

Certainly, the findings in the first two sentences are unobjectionable; the trial judge properly recognized Nader's evidentiary burdens to establish a *prima facie* case. Indeed, the facts necessary for a *prima facie* case are undisputed; Nader held a confirmed reservation for flight 864, had complied with Allegheny's preboarding conditions, and was entitled to a seat. Undeniably, Nader's priority was dishonored. Notwithstanding, we have considerable difficulty with the remainder, and cannot agree with appellee that the trial judge properly interpreted the law and found as a fact that Allegheny failed to prove its adherence to its priority rules in boarding flight 864.

[12, 13] That remainder, the sentence set out in italics above, certainly can be viewed as holding that Allegheny could not meet its burden of proof merely by introducing its duly filed priority rules and showing its adherence to them. In fact, the trial judge made no reference to the priority rules at all, and instead focused on a more general concept of reasonableness. If the trial judge expected Allegheny to prove the reasonableness of its rules with reference to some abstract judicial standard of that concept, then he made an error of law. It is beyond dispute that the reasonableness, *vel non*, of Allegheny's priority rules

must be determined, in the first instance by the Civil Aeronautics Board. *See* Montana-Dakota Utilities Co. v. Northwestern Public Service Co., 341 U.S. 246, 251, 71 S.Ct. 692, 95 L.Ed. 912 (1951). Moreover, the trial judge indicated that Allegheny failed to meet its burden of proof because it allowed "passengers with *subsequent* or no reservations to have priority over a passenger with a confirmed reservation . . . ." Nader v. Allegheny Airlines, Inc., *supra*, 365 F.Supp. at 132 (emphasis supplied). However, neither party contended that Allegheny determined boarding priority based on the time that a passenger made his reservation or purchased his ticket. Accordingly, asserting that Allegheny boarded passengers who reserved space after Nader is irrelevant unless the trial judge believed that he could make his own determination of reasonableness based on this record. Finally, this interpretation of the standard that the district court applied is reinforced by his emphasis that passengers with subsequent or no reservations were boarded ahead of Nader although he "had not been informed of the risks attendant to the Defendant's concealed policy of overbooking." *Id.* Nader's knowledge of Allegheny's overbooking practics, while relevant to the misrepresentation issue, is not material to the section 404(b) cause of action.

[14] Because of ambiguities in the trial judge's findings, we cannot say that he properly interpreted the applicable law; nor can we say that he made findings of fact supportive of the conclusion that Allegheny violated its *own* priority rules in refusing to board Nader. Thus, we simply are in no position to affirm the district court's findings as formulated. Nevertheless, properly formulated findings of fact are not jurisdictional, *see* Davis v. United States, 422 F.2d 1139, 1142 (5th Cir. 1970); Securities &

Exchange Commission v. Frank, 388 F.2d 486, 493 (2d Cir. 1968), and we need not remand the case if an intelligent review of the record can be undertaken despite their absence. *See* Group Association Plans, Inc. v. Colquhoun, 151 U.S.App.D.C. 298, 466 F.2d 469, 472 (1972). However, the record in this case conflicts at many crucial points and we cannot properly execute our review function without findings by the trial judge, who initially viewed the demeanor of the witnesses and can reopen the record if further evidence is necessary. A summary of the evidence will underscore our reasons for remanding the section 404 (b) claim.

Allegheny's case consisted, *inter alia*, of the testimony of the agent who handled the denied boarding incident and the introduction of its manual that instructs its employees of the procedures to follow when a flight is oversold. The agent testified that when passengers are checked-in at the departing flight's boarding point, Allegheny's priority rules require boarding all passengers whose tickets have an "OK" marked in the status column.[29] Passengers whose tickets are not marked "OK" can be boarded if their names appear on Allegheny's passenger list as holding a confirmed reservation. When the first oversale appeared, he checked the collected tickets and only one was not marked "OK"; the passenger holding that ticket appeared on the confirmed reservation passenger list.[30] According to the agent, when gate check-in is used, as here, selection of passengers to be denied boarding is automatic – the first person arriving after the flight is fully boarded is the first oversale, the

29 Transcript, *supra* note 1, at 215.

30 *Id.* at 176, 206-07.

second person becomes the second oversale, etc. Under no circumstances are agents to remove confirmed reservation passengers who already have been boarded.[31] The manual directly supports that portion of the agent's testimony relating to relevant procedures when an oversale is not discovered until a flight is being boarded and gate check-in is used. App. at 219.

To rebut Allegheny's case, Nader introduced two internal Allegheny memoranda. The first, exhibit B, a memorandum from Allegheny's Director of Reservation states: "We are attributing the three oversales to boarding discrepancies and planned capacity. Of the passengers boarded DCA/BDL, [Washington-Hartford] one was on the waitlist and one had been previously cancelled as a no-show." App. at 211. The second memo, exhibit C, lists the names of the two passengers who were boarded on flight 864 although they actually held lower priorities than Nader. *Id.* at 210. Nader argued that these exhibits proved that Allegheny had not followed its rules. Plaintiff's Post-Trial Memorandum at 7. Moreover, Nader contended that Allegheny's agent had followed the wrong section of the manual in deciding that selection of oversold passengers was automatic: If the agent could have determined in advance that the flight was oversold, then the manual requires the agent to choose passengers who would be least inconvenienced. *Id.* Since the flight was overbooked, Nader maintained that this "clearing" procedure should have been followed. *Id.; see* App. at 94-95, 218-19.

[15] In sum, the transcript and exhibits reveal a number of relevant issues that the trial judge's findings do not

31 *Id.* at 182, 193.

resolve: (1) whether Allegheny's manual is sufficiently clear to establish its priority rules within the meaning of 14 C.F.R. § 250.3; (2) if so, what priority rules does the manual create, and whether the agent's interpretation comports with their language; and (3) assuming *arguendo* that the agent applied the proper rules, whether his testimony is credible in view of Allegheny's internal memoranda. These issues simply cannot be resolved at the appellate level. Their proper resolution requires credibility findings and may even necessitate reopening the record so that the parties may discharge their burdens. As an appellate court we can do neither.

Allegheny has vigorously contested the need for a remand, arguing that Nader cannot prove that Allegheny's violations, if any, proximately caused his damages. Allegheny maintains that since, at most, two persons with lower priorities than Nader were boarded, and since the two other oversold passengers would have been boarded ahead of Nader by virtue of their earlier arrival at the gate, Nader would not have been boarded in any event. Unfortunately, this argument assumes that selection of passengers to be denied boarding was automatic – an assumption that is contested. Moreover, even if the selection were automatic, we cannot say that Nader would not have been accommodated on flight 864. Certainly, the possibility exists that if the two boarding discrepancies had been discovered before departure, one of the other oversold passengers would have given Nader his seat after hearing of his predicament. Since the other oversold passengers elected to use the alternative transportation, they may not have been as concerned as Nader about getting to Hartford by 11:15 a.m. Thus, Allegheny's contention does not alleviate the need for a remand.

B. *Common Law Misrepresentation*

Both Nader and CCAG recovered on the second cause of action, the common law tort of fraudulent misrepresentation. Applying the accepted definition of the tort,[32] the trial judge found that: Allegheny "knowingly and intentionally misrepresented a material fact, namely that Mr. Nader had a guaranteed reservation for a seat;" Nader and CCAG relied to their detriment on the misrepresentation; their reliance was reasonable; and CCAG could recover because it was foreseeable that members of the public would rely on Allegheny's misrepresentations. Nader v. Allegheny Airlines, Inc., *supra*, 365 F.Supp. at 132.

[16] Although the trial judge found that Allegheny, "through advertising and other means," affirmatively misrepresented to Nader that he had a guaranteed reservation for a seat, *Id.* at 131, there is absolutely no probative evidence in the record to support a specific finding of an affirmative misrepresentation. In fact, the only record evidence on this issue is the testimony of Nader and of Allegheny's President, Leslie Barnes. Nader testified that since Allegheny advertises its reliability, publishes its schedule

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32 The elements of fraudulent misrepresentation are set forth in Sankin v. 5410 Connecticut Avenue Corp., 281 F.Supp. 524, 545 (D.D.C. 1968), aff'd sub nom. Benn v. Sankin, 133 U.S.App.D.C. 361, 410 F.2d 1060 (1969), cert. denied, 396 U.S. 1041, 90 S.Ct. 681, 24 L.Ed.2d 685 (1970):

> (1) A false representation (2) in reference to a material fact (3) made with knowledge of its falsity (4) and with the intent to deceive (5) with action taken in reliance upon the representation.

(citations omitted); *see* W. Prosser, Law of Torts, § 105 at 684-85 (4th ed. 1971).

of flights, and accepts reservations, it was his understanding that a reservation would not be accepted unless a seat could be provided.[33] He was unable to show any specific instances of affirmative misrepresentations.[34] Barnes testified that Allegheny attempts to portray an image of reliability in its advertising, that Allegheny advertises that reservations may be made by contacting the airline or a travel agent, and that a passenger who makes a reservation has, "within normal latitudes," a reasonable expectation of receiving a seat.[35] Thus, we reverse the finding that Allegheny affirmatively represented to Nader that he had a guaranteed reservation for a seat because it is clearly erroneous and without evidentiary support.

[17, 18] In reality, the gravamen of appellees' complaint is *nonrepresentation* rather than misrepresentation. The issue that the court must decide is, assuming *arguendo* that the public shares the perception, created either by the aura of Allegheny's advertising or more generally, by shared societal notions about the meaning of a confirmed reservation, that a confirmed reservation guarantees a seat, whether Allegheny had a duty to disclose the possibility that its policy of deliberate overbooking could alter these expectations. To resolve this question, we address the contention, pressed by Allegheny and the Civil Aeronautics Board, that the existence of the Board's power under section 411 of the Federal Aviation Act, 49 U.S.C. § 1381 (1970), to

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33 Transcript, *supra* note 1, at 67-73.

34 *Id.* at 68-69, 72.

35 Deposition of Leslie N. Barnes, at 7-8, 11-13. Barnes' deposition was accepted as his testimony in lieu of his appearance. Transcript, *supra* note 1, at 96-97.

investigate and determine whether an air carrier "has been or is engaged in unfair or deceptive practices or unfair methods of competition"[36] precludes a common law tort action for fraudulent misrepresentation. In effect, appellant and amicus curiae argue that the Board's regulatory power over reservation practices, which are intertwined with the level and structure of air fares, gives it exclusive jurisdiction over these practices and eliminates common law remedies. Nader's response is that Congress did not intend to pre-empt all private tort actions involving airline practices when it passed the Federal Aviation Act.[37] Thus

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36 § 1381. Methods of competition.

> The Board may, upon its own initiative or upon complaint by any air carrier, foreign air carrier, or ticket agent, if it considers that such action by it would be in the interest of the public, investigate and determine whether any air carrier, foreign air carrier, or ticket agent has been or is engaged in unfair or deceptive practices or unfair methods of competition in air transportation or the sale thereof. If the Board shall find, after notice and hearing, that such air carrier, foreign air carrier, or ticket agent is engaged in such unfair or deceptive practices or unfair methods of competition, it shall order such air carrier, foreign air carrier, or ticket agent to cease and desist from such practices or methods of competition.

37 Appellee also argues that Allegheny waived this defense and several variations that relate to primary jurisdiction by failing to raise them in an appropriate manner before the district court. While Allegheny could have significantly aided the district court proceedings by presenting its jurisdictional argument more vigorously, Allegheny's third defense to appellee's complaint adequately apprised the district court of appellant's position:

> This action does not appropriately belong within the

(continued)

framed, the issue becomes the effect, if any, the passage of the Federal Aviation Act had on the remedies available for the common law misrepresentational torts of air carriers.

[19, 20] It seems clear that the deceptive practices that the Board has power to proscribe under the Act would include all of the carrier misrepresentations actionable under the common law. However, we simply cannot accept the proposition that the existence of the Board's power under section 411 eliminates all private remedies for common law torts arising from those types of misrepresentations or other forms of unfair or deceptive practices. The Supreme Court has noted in American Airlines, Inc. v. North American Airlines, Inc., 351 U.S. 79, 85, 76 S.Ct. 600, 100 L.Ed. 953 (1956) that section 411 of the Federal Aviation Act was modeled after section five of the Federal Trade Commission Act, and this court indicated in Holloway v. Bristol-Myers Corp., 158 U.S.App.D.C. 207, 485 F.2d 986, 989 (1973), that the remedies of section five were additional to rather than in derogation of the common law remedies for fraud and deceit. Moreover, while the arsenal of remedies available to the Civil Aero-

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37 (continued)
jurisdiction of this Court in that it challenges the legality and propriety of Defendant Allegheny's reservation and denied boarding practices, which considerations are by law assigned to the Civil Aeronautics Board and not to the courts.

Appendix at 13. Moreover, we must agree with the fifth circuit that since such questions involve "the proper allocation of business between the courts and administrative agencies," they may not be waived. Louisiana & Arkansas Railway Co. v. Export Drum Co., Inc., 359 F.2d 311, 314 (5th Cir. 1966).

nautics Board is significant, it does not include the power to award damages to injured parties.[38] Finally, to hold that the Act preempts the common law remedies would ignore section 1106 of the Act, 49 U.S.C. § 1506 (1970), which states: "Nothing contained in this chapter shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this chapter are in addition to such remedies."

However, despite the similarities between section 5 of the Federal Trade Commission Act and 411 of the Federal Aviation Act, the differences between the two would itself suggest that the common law misrepresentational torts did not remain unaffected by the Act. The Supreme Court recognized as much in American Airlines, Inc. v. North American Airlines, Inc., *supra*, 351 U.S. at 83-84, 76 S.Ct. at 604:

> Section 5 is concerned with purely private business enterprises which cover the full spectrum of economic activity. On the other hand, the air carriers here conduct their business under a regulated system of limited competition. The business so conducted is of especial and essential concern to the public, as is true of all common carriers. . . . Finally, Congress has committed the regulation of this industry to an administrative agency of special competence that deals only with the problems of the industry.

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38 *Compare* T.I.M.E., Inc. v. United States, 359 U.S. 464, 79 S.Ct. 904, 3 L.Ed.2d 952 (1959) *with* Hewitt-Robbins, Inc. v. Eastern Freight-Ways, Inc., 371 U.S. 84, 83 S.Ct. 157, 9 L.Ed.2d 142 (1962).

[21] This conclusion, that the common law remedies for fraud and deceit cannot remain totally unaffected by the Act, is buttressed by the fact that the practices at issue have a significant rate making effect. Besides the Board's power to control deceptive practices, section 102 of the Act, 49 U.S.C. § 1302 (1970), charges the Board with the responsibility for promoting a number of goals that Congress specifically found to be in the public interest. In carrying out its functions, the Board is to encourage the "development of an air-transportation system properly adapted to the present and *future* needs of . . . foreign and domestic commerce . . . ," and is to promote "adequate, economical, and efficient service . . . by air carriers at reasonable charges . . . ." (emphasis supplied). Further, section 1002(e), 49 U.S.C. § 1482(e) (1970) requires the Board, in its rate making capacity to balance "[t]he need in the public interest of adequate and efficient transportation service . . . at the lowest cost consistent with the furnishing of such service . . ." with "[t]he need of each air carrier for revenue sufficient . . . to provide adequate and efficient . . . service." Having charged the Board with these important responsibilities, Congress must have necessarily given the Board the power to carry out its functions. We think that this power must be read broadly to include the approval in the public interest of some practices that might be considered common law misrepresentations. The effect of such approval, or a holding that they do not represent deceptive practices, would be to establish that the practices, as a matter of law, do not constitute common law misrepresentations.[39]

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[39] Our holding neither gives the Board unwonted power nor insulates such practices from judicial scrutiny. Board orders are subject (continued)

Lastly, although the saving clause of section 1106 purports to speak in absolute terms it cannot be read so literally. Nearly seventy years ago, in the celebrated case of Texas & Pacific Railway Co. v. Abilene Cotton Oil Co., 204 U.S. 426, 446, 27 S.Ct. 350, 358, 51 L.Ed. 553 (1907), the Supreme Court, ruling on the applicability of an identical clause in the Interstate Commerce Act, stated: "This clause, however, cannot in reason be construed as continuing in shippers a common law right, the continued existence of which would be absolutely inconsistent with the provisions of the act. In other words, the act cannot be held to destroy itself."

[22, 23] We believe that the factors outlined above indicate that Congress, by enacting the Federal Aviation Act, expected some alteration of the common law so that the Board could effectively regulate the airline industry in the public interest. Thus, if the Board properly finds that a practice is not deceptive, a common law action for misrepresentation must fail as a matter of law. Given this interpretation, when the allegedly tortious practice is one that has been directly regulated by the Board, or while not directly regulated is so obviously tied to a regulated practice or rate that a change in one would require a change in the other, the Board must determine, in the first instance, whether the practice falls within the ambit of the deceptive practices provisions of section 411.[40]

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[39] (continued)
to review in the Courts of Appeals and must be supported by substantial evidence. *See* 49 U.S.C. § 1486 (1970).

[40] On the other hand, a Board finding of deceptiveness does not end the case. Other elements of the tort, for example, knowledge and reliance where the complaint alleges fraudulent misrepresentation, remain to be adjudicated.

[24-26] This result is but another application of the principles of primary jurisdiction, a doctrine whose purpose is the coordination of the workings of agency and court. *See* 3 K. Davis, Administrative Law Treatise, § 19.01 (1958). Primary jurisdiction recognizes that even though a claim may be cognizable in the courts, technical questions often call for the judgment of an agency presumably expert in the field under judicial consideration. Perhaps more importantly, where Congress has entrusted the regulation of an industry to a single regulatory body, uniformity of policy and practice can only be achieved by submitting relevant issues to the affected agency for consideration. *See generally* Far East Conference v. United States, 342 U.S. 570, 72 S.Ct. 492, 96 L.Ed. 576 (1952); Price v. Trans World Airlines, Inc., 481 F.2d 844 (9th Cir. 1973); Lichten v. Eastern Airlines, Inc., 189 F.2d 939 (2d Cir. 1951); Adler v. Chicago & Southern Air Lines, Inc., 41 F.Supp. 366 (E.D.Mo.1941).

[27] It is beyond peradventure that the requisites for submission to the Board are met in this case. As demonstrated in part II, the Board has been quite active in this area and has recognized the relationship of the carriers' reservations policies to the structure and level of air fares. Moreover, the discussion of deliberate overbooking in part II illustrates that the determination whether overbooking is or is not a deceptive practice involves technical and policy judgments that should properly be submitted to the Board in the first instance. Finally, since the problems are as wide as the industry itself, a single, industry-wide resolution is appropriate. Thus, in the absence of an existing Board decision disposing of this question, the issue of whether the air carriers' overbooking policies, including their policy of nondisclosure, may be characterized as a

tortious misrepresentation must first be submitted to the Board to ascertain whether the conduct violates section 411.

[28] The question remains whether an existing decision of the Board obviates the need for the parties to undertake a new adjudicatory proceeding before that agency. We take judicial notice of a proceeding currently before the Board, which has raised the issues under consideration here. We believe that the resolution of that proceeding should eliminate the need for further resort of the Board.

In part II, we summarized the recent history of the Board's involvement in regulating the carriers' overbooking practices. After tracing that history, we noted that late in 1973, the Board became concerned that the cutbacks in air carrier service necessitated by the Arab oil embargo might lead to an increasing no-show problem that could cause a breakdown in the present reservation system. Therefore, on January 3, 1974, the Board announced an investigation into air carrier reservation practices and a rule making. Emergency Reservation Practices Investigation, 39 Fed.Reg. 823 (CAB Order 73-12-93, EDR-260, 1974). The Board uncategorically stated that the following issue was to be resolved in this proceeding:

> Whether, in light of the fuel allocation program, the present rules, regulations, or practices of all domestic certificated air carriers (except all-cargo carriers) pertaining to ticketing, reservations (including reconfirmation), and denied boarding compensation in interstate air transportation, *are* or will be unjust or unreasonable, or unjustly discriminatory, or unduly preferential, or unduly prejudicial, or otherwise unlawful; and if so, what should be the lawful rules, regulations or practices to be

determined and prescribed by the Board.

Id. at 826 (emphasis supplied). All certificated passenger carrying airlines were made parties to the proceeding and numerous other organizations, including those representing business and consumer interests, intervened.

Among the intervenors in the Emergency Reservation Practices Investigation is the Aviation Consumer Action Project (ACAP). This organization, which was organized to promote the interests of the air travelling public, participated extensively in all phases of the investigation. Besides cross-examining many of the carriers on their overbooking practices, ACAP specifically called into question the legality of the practice of deliberate overbooking and of the carriers' refusal to disclose this practice to the public. ACAP's brief to the administrative law judge opined:

> It is ACAP's view that, if there has been any material increase in deliberate multiple overbooking during recent months, this should be seen as a natural defensive strategy to what the public sees as unstable conditions in the industry and abusive practices by the carriers. In short, much of the travelling public has lost confidence in the reliability and integrity of airline commitments because of schedule irregularities, last-minute equipment substitutions, employee layoffs, frequent misinformation and lack of candor by the carriers, and the recent revelations of industry-wide practices of deliberate overbooking. *See e.g.*, Nader v. Allegheny Airlines, Inc., 365 F.Supp. 128 (D.D.C. 1973). By controlling those practices to protect the public, much of the incentive for multiple overbooking would be removed.

Opening Brief of the Aviation Consumer Action Project,

Emergency Reservation Practices Investigation, *supra*, at 5-6 (citation omitted).

Moreover, in describing its suggested revisions of the current reservations practices, ACAP argued specifically that deliberate overbooking is a deceptive practice that should be held unlawful and prohibited:

> This proceeding has established for the first time, as a matter of record, the astonishing fact that all of the major scheduled carriers engage in some form of deliberate overbooking of their flights. Most of the carriers have also admitted that they do not advise their passengers of this practice. While this is consistent with the findings of the District Court in Nader v. Allegheny Airlines, *supra*, it is the first time that this information has actually been made available to the Bord, and the first time that the Board has ever been called upon to deal with this situation in such a direct way. . . .
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> * * * * *
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> ACAP believes the practice of deliberate overbooking, compounded by concealment and failure to warn, always has been and is still unfair, deceptive, unjust, unreasonable, unduly prejudicial, discriminatory, and illegal.

Id. at 12-14 (citations omitted). In short, there can be no doubt that ACAP, through its extensive cross-examination of airline witnesses and through its brief, raised the issue of whether the carriers' overbooking policies are deceptive, unjustly discriminatory, or otherwise unlawful.

Just as surely, there can be no doubt as to the decision of the administrative law judge. In his decision, issued June 10, 1974, he recognized the dimensions of the overbooking problem and noted that between 1969 and 1973

the carriers reduced the actual number of persons denied boarding by 43 percent while the number of passenger enplanements increased by some 20 million persons.[41] Moreover, the administrative law judge noted that "[n]o real contention, much less a showing, has been made that present levels of denied boarding compensation are not compensatory or that they are otherwise inadequate to make a passenger whole, which was the fundamental underlying purpose for the enactment of the regulation."[42] However, the most important and definitive part of the decision for our purposes is found in the order accompanying the opinion, which states:

> The present rules, regulations, and practices of domestic certificated scheduled air carriers pertaining to ticketing, reservations (including reconfirmation), and denied boarding compensation, in interstate transportation . . . are not unjust or unreasonable, unjustly discriminatory, unduly preferential, unduly prejudicial, or otherwise unlawful;[43]

We think that the decision in the Emergency Reservation Practices Investigation should substantially resolve whether the practices at issue are deceptive within the meaning of section 411. *Cf.* Aloha Airlines, Inc. v. Hawaiian Airlines, Inc., 489 F.2d 203, 211 (9th Cir. 1973), cert. denied, 417

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41 Initial Decision, CAB Docket No. 26253, *supra* note 10, at 29.

42 *Id.* at 51.

43 Order of Associate Chief Administrative Law Judge Robert L. Park, Emergency Reservations Practices Investigation, CAB Docket No. 26253 (June 10, 1974) (Order accompanies Initial Decision).

U.S. 913, 94 S.Ct. 2612, 41 L.Ed.2d 217 (1974). However, since petitions for discretionary review of the administrative law judge's decision are currently pending before the Board, we instruct the district court to stay further proceedings on the misrepresentation cause of action pending the outcome of the proceedings in the Emergency Reservation Practices Investigation.[44] *See* Ricci v. Chicago Mercantile Exchange, 409 U.S. 289, 93 S.Ct. 573, 34 L.Ed.2d 525 (1973); General American Tank Car Corp. v. El Dorado Terminal Co., 308 U.S. 422, 60 S.Ct. 325, 84 L.Ed. 361 (1940). While it is possible that, in light of the broader scope of those proceedings, the Board would not in the normal course give specific attention to the deceptiveness of failing to publicize overbooking practices, we may assume that the Board will give the matter such attention (*sua sponte* if necessary) in response to this opinion.

There is one final question in this area requiring resolution – assuming Allegheny's liability for misrepresentation,

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44 Our resolution of this issue makes it unnecessary to consider at length appellees' argument that citizen complaints cannot trigger section 411 proceedings. We simply note that appellees have not explained why a court could not expect the Board to act on its own motion– as it may under section 411–when a court has stayed into proceedings to allow the Board to consider an issue, or why a citizen could not initiate a section 411 proceeding by using the procedures set forth in section 1002(a), 49 U.S.C. § 1482(a)(1970). *See* Aviation Consumer Action Project v. Trans World Airlines, Inc., CAB Order 72-11-106 (November 24, 1972), aff'd sub nom. Aviation Consumer Action Project v. C.A.B., 161 U.S.App.D.C. 237, 494 F.2d 1156 (1974) (no opinion). Moreover, we see no reason why an air carrier cannot be ordered by the court to initiate section 411 proceedings when the carrier seeks to invoke the Board's jurisdiction.

whether appellees may recover for their reliance. The trial judge's award of damages to CCAG raises one of the most troublesome problems in this area of tort law: When may a third party recover his pecuniary losses for reliance on a misrepresentation that was not made to him. In this case, the trial judge employed the following reasoning to conclude that CCAG as well as Nader could recover for Allegheny's misrepresentation:

> CCAG is eligible and entitled to recover herein for damages it has incurred due to the Defendant's intentional misrepresentation even though they were not direct parties to the transaction in issue because: (1) The misrepresentation was knowingly and intentionally made; privity of contract is not required here; (2) CCAG was within the class of foreseeable plaintiffs (the class is determined by the Defendant's legal duty to the public at large both under its license and by its better position to prevent injury to the public by full disclosure of its practices affecting the public; (3) CCAG made a reasonable reliance on the misrepresentation and was thereby damaged. . . .

Nader v. Allegheny Airlines, Inc., *supra,* 365 F.Supp. at 132-33 (citations omitted).

[29] Of course, questions involving the scope of liability for fraudulent misrepresentation are questions of "local" rather than federal law. Thus, we must look to the common law of the District of Columbia since, under all of the various choice of law principles, the law of this jurisdiction would be applied. *See generally* Dovell v. Arundel Supply Corp., 124 U.S.App.D.C. 89, 361 F.2d 543 (1966); Emmert v. United States, 300 F.Supp. 45 (D.D.C. 1969). Apparently, the question of third party recovery for

fraudulent misrepresentation is virtually one of the first impression, as the parties have not referred us to any District of Columbia decisions that have confronted this issue, and our research has uncovered only one such case. In that case, New York Tile & Mortgage Co. v. Hutton, 63 App.D.C. 266, 71 F.2d 989, cert. denied, 293 U.S. 605, 55 S.Ct. 122, 79 L.Ed. 696 (1934), the court applied the then prevalent rule to determine that a title company which lauded the facilities of another title company by letter in order to obtain title business could not be held liable for fraudulent misrepresentation where the letter was used by the other title company to aid in the sale of its stock. We therefore turn to the legal principles that have guided other courts and commentators.

[30] It is unequivocal that privity of contract is not a prerequisite to recovery where the plaintiff proves fraudulent misrepresentation. *See, e.g., Id.* at 991; Miller v. Bargain City, U.S.A., Inc. 229 F.Supp. 33, 39-40 (E.D.Pa. 1964); Oppenhuizen v. Wennersten, 2 Mich.App. 288, 139 N.W.2d 765 (1966). *But see* Denning v. Bolin Oil Co., 422 F.2d 55, 58 (10th Cir. 1970) (applying Oklahoma law). Even before the celebrated case of Ultramares Corp. v. Touche, 255 N.Y. 170, 174 N.E. 441 (1931), the generally accepted rule was that the maker of a fraudulent misrepresentation is liable to those he intends to influence, regardless of privity of contract. *See, e.g.,* Wollenberger v. Hoover, 346 Ill. 511, 179 N.E. 42, 67 (1931); Restatement (Second) of Torts, Explanatory Notes § 531, at 96 (Tent.Draft No. 10, 1964). In *Ultramares,* Justice Cardozo, while Chief Judge of the New York Court of Appeals, broadened the rule by finding that an accountant not only owed a duty to his employer to prepare and certify financial statements without fraud, but also owed the

same duty to creditors and investors to whom the financial statements might be exhibited, "since there was notice in the circumstances of its making that the employer did not intend to keep it to himself." *Id.* at 174 N.E. 444. In 1964, the revisors of the Restatement of Torts reported that "[t]he prestige of the case has been so great that it must be taken as a new point of departure. The problem is to find language to state the broader rule without going too far." Restatement (Second) of Torts, *supra*, at 96.

Nevertheless, the elimination of the privity requirement and the further broadening of the rule pioneered by *Ultramares* does not mean that every aggrieved third party may recover from the maker of a misrepresentation. To allow recovery without limiting third parties in any respect raises the spectre of an indeterminate liability totally disproportionate to any notion of fault involved, especially in view of the ease of proving reliance. Thus, the class of person who may recover has been defined by the revisors of the Restatement of Torts as those persons to whom the maker "intends or has reason to expect to act . . . in reliance upon the misrepresentation." *Id.* at 95. The revisors explain that:

> for the maker of a fraudulent misrepresentation to have reason to expect that it will reach third persons and influence their conduct, it is not enough that he recognizes, or as a reasonable man should recognize, the risk that it may be communicated to them and they may act upon it. . . .
>
> Virtually any misrepresentation is capable of being transmitted or repeated to third persons, and if sufficiently convincing may create an obvious risk that they may act in reliance on it. Such a risk is not enough for the liability covered in this Section.

Id. at 102.

Dean Prosser took a similar view. He stated that where the defendant commits fraudulent misrepresentation, an unidentified member of a group or class may recover if the defendant has *special reason* to expect that any member of the class may be reached and influenced. However, he was quick to point out that "the line is definitely drawn" where the plaintiff is unidentified and the defendant has no special reason to expect that he may act in reliance.

> The defendant may well be aware that his representation is capable of being passed on to others, and that at some subsequent date it may come into the hands of someone who will rely on it, act upon it, and suffer loss if it is false. But this amounts to nothing more than the general foreseeability of transmissions to others which is inseparable from the human word. In the face of indeterminate extent, magnitude, and duration of liability, the courts always have drawn back from its imposition.

Prosser, Misrepresentations and Third Persons, 19 Vand.L. Rev. 231, 251-52 (1966) (citation omitted); *see id.* at 246-53. Court decisions have generally supported this limitation; no court has gone any further and many restricted recovery to a greater extent. *See, e.g.,* Denning v. Bolin Oil Co., *supra,* 422 F.2d at 59 (concurring opinion); Miller v. Bargain City, U.S.A., Inc., *supra,* 229 F.Supp. at 38-40; Pamela Amusement Co., Inc. v. Scott Jewelry Co., 190 F.Supp. 465, 468 (D.Mass.1960); Cohen V. Citizens National Trust & Savings Bank, 143 Cal.App.2d 480, 300 P.2d 14 (1956); Gulf Oil Corp. v. Newton, 130 Conn. 37, 31 A.2d 462 (1943); Metric Investment, Inc. v. Patterson, 101 N.J.Super.301, 244 A.2d 311 (App.Div.1968); Westcliff Co., Inc. v. Wall, 153 Tex. 271, 267 S.W.2d 544

(1954); *cf.* Rozny v. Marnul, 43 Ill.2d 54, 250 N.E.2d 656, 662-63 (1969). With these principles in mind, we consider whether Nader and CCAG are within the class of persons who may recover.

[31, 32] Although the trial judge apparently did not explicitly consider Nader's position, it is manifest that Nader was not in privity with Allegheny at the time of the misrepresentation, nor was he identified as a person to whom the misrepresentation was directed. However, he was within an identifiable class of third persons – potential passengers – that Allegheny intended to influence. Although the class of persons is large, liability is justified by the notion that, in general, loss caused by intentional wrongdoing should be placed on the wrongdoer rather than on the innocent party. *See* Rusch Factors, Inc. v. Levin, 284 F.Supp. 85, 90 (D.R.I.1968).

[33-36] CCAG, however, is a party more remote from the transaction than Nader. It was not identified to Allegheny until this law suit was instituted.[45] Allegheny had no special reason to know of CCAG's reliance or even of its existence. In fact, CCAG is really a member of a vast indeterminate class that may be equated with the public itself. The trial judge seems to have recognized this, as he stated: "It was foreseeable that the Defendant's intentional misrepresentation would be relayed to other *members of the public* and that they would rely upon the Defendant's representation . . . ." Nader v. Allegheny Airlines, Inc., *supra.* 365 F.Supp. at 132 (emphasis supplied). However, as discussed above, foreseeability is not the test to be used in determining the class of third

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45 Transcript, *supra* note 1, at 59.

persons who may recover; otherwise, liability in a case such as this could become indeterminate. To hold that CCAG is within the class of persons who may recover would mean that virtually any plaintiff, no matter how far removed from the transaction or incident, can recover the full amount of his damages. We are unwilling to extend liability that far and consequently hold that CCAG cannot recover as Allegheny's duty did not extend to it.[46]

IV. PUNITIVE DAMAGES

The trial judge awarded punitive damages of $25,000 to each appellee. Nader's award was apparently premised both on the finding that Allegheny violated section 404(b) and

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46 Throughout this litigation, Allegheny has maintained that appellees' action is barred by Allegheny's tariff–Tariff CAB No. 142, Local and Joint Passenger Tariff No. Pr-6, Rule 40(b)–because appellees failed to give written notice of the incident to Allegheny within 45 days of its occurrence. However, private statutes of limitations such as the one before us can be waived by the carrier. *See* United Fruit Co. v. J.A. Folger & Co., 270 F.2d 666 (5th Cir. 1959), cert. denied, 362 U.S. 911, 80 S.Ct. 682, 4 L.Ed.2d 619 (1960). The district court held that Allegheny's denied boarding compensation draft to Nader of $32.41, which if accepted released Allegheny from all claims arising from the incident, and which, on its face, remained open to acceptance for 60 days, constituted a waiver of the 45 day tariff provision. Since Nader brought this suit within the 60 day period, we cannot say that the district court's holding was clearly erroneous.

In light of our disposition, we need not pass on the soundness of the district court's other holdings on the tariff issue; nor do we pass upon the tariff's applicability to CCAG as we hold that CCAG cannot recover on the merits.

that it misrepresented material facts; CCAG's award was apparently based only on the latter ground. *See* Nader v. Allegheny Airlines, Inc., *supra*, 365 F.Supp. at 132-33. Although we vacate each of the holdings that support the awards, we believe that the course of this litigation will best be advanced by considering the propriety of the punitive damage award.

We first consider whether this record can support a finding of punitive damages, assuming *arguendo* that Allegheny violated section 404(b). Without any further explanation, the trial judge held: "The Plaintiff, Mr. Nader, is entitled to both compensatory and punitive damages under the antidiscrimination provisions of the Federal Aviation Act of 1958 . . . ." *Id.* at 132. However, we fail to perceive any evidence in the record that could possibly support a verdict for punitive damages on this ground.

[37-39] It is a cardinal rule that punitive damages may be awarded to punish a defendant for the outrageous nature of his conduct and to deter the defendant and others from engaging in the same or similar acts. *See, e.g.*, Chesapeake & Potomac Telephone Co. v. Clay, 90 U.S.App.D.C. 206, 194 F.2d 888, 891 (1952); W. Prosser, Law of Torts, *supra*, § 2, at 9-10. As such, mere inadvertence or even gross negligence will not suffice to support an award of punitive damages. *See id.* The tort must be "aggravated by evil motive, actual malice, deliberate violence or oppression." Black v. Sheraton Corp. of America, 47 F.R.D. 263, 271 (D.D.C.1969). Since we held earlier that overbooking is not *per se* a violation of section 404(b), but that a violation occurs when an airline disregards its own priority rules, the question becomes whether the nature of Allegheny's conduct in denying Nader a seat on flight 864 contains elements of intentional wrongdoing or

conscious disregard for Nader's rights. This question must be answered in the negative.

There is absolutely no evidence that Allegheny refused to board Nader for his activities against airlines or because of any other nefarious reason, nor was Nader treated discourteously. At most, the record reveals a very busy passenger services agent who failed to do all that he could to discover whether every passenger on flight 864 held a confirmed reservation. However, this is not sufficient to award punitive damages. Although Nader contends that the trial judge could have awarded punitive damages because the agent refused "to take reasonable measures, while the plane was still at the gate, to attempt to alleviate the harmful consequences that would befall Mr. Nader and CCAG," Appellee's Br. at 37, we cannot impute any evil or wanton motive to the agent. He testified that he was following his manual which specifically states: "Do not delay the flight seeking a passenger who would be least inconvenienced." App. at 219. While Nader argues that this section of the manual should not have been applied, we have no reason to doubt the agent's good faith in believing that it applied. Moreover, the agent tried to arrange alternative transportation as soon as he realized that flight 864 was oversold.

Nader relies on Wills v. Trans World Airways, Inc., *supra*, to support the argument that punitive damages are appropriate in the case *sub judice*. However, even a cursory examination of *Wills* reveals significant differences that militate against awarding punitive damages on the facts before us. In *Wills*, an economy class passenger was denied a seat so that the airline could accommodate all of its first class passengers. In so doing, the airline knew that it was violating its own priority rules. Moreover, the airline told the

passenger that he was being bumped because he had not followed the required procedures for reconfirming his reservation. In fact, he had twice reconfirmed, but the airline's agents made no effort to verify this. Thus, the actions in *Wills* were deliberate and displayed a spirit of malice not evident here.

Nader also argues that punitive damages were awarded in *Wills* because the overbooking was substantial. However, that was only one factor in many that were considered and was merely additional evidence of malice. However, in the case *sub judice*, there is no other evidence of malice. Thus, even if Allegheny's overbooking can be characterized as substantial, there can be no finding of malice without additional aggravating factors.

[40] Several recent cases have emphasized the deterrent value of punitive damages; however, they do not explicitly reject the concept that the conduct must be malicious. *See, e.g.,* International Brotherhood of Boilermakers v. Brasswell, 388 F.2d 193 (5th Cir. 1968); Kozar v. Chesapeake & Ohio Railway Co., 320 F.Supp. 355 (W.D.Mich. 1970), vacated in part, 449 F.2d 1238 (6th Cir. 1971). If the trial judge's theory was deterrence, that is to force Allegheny to change its boarding or reservation procedures to eliminate denied boarding incidents, then the award cannot stand because it interferes with the primary jurisdiction of the Civil Aeronautics Board. As stated previously, Congress has entrusted the regulation of the airline industry to the Board, and prospective changes in air carrier practices must first be considered by it, subject to judicial review. Significantly, the *Wills* court denied an injunctive remedy against the same practice for which it awarded punitive damages, reasoning that "the Act specifies . . . that a complaint may be brought before the administrative agency,

which is duty bound to investigate, and then may issue an order compelling further compliance with the requirements of the Act." Wills v. Trans World Airways, Inc., *supra,* 200 F.Supp. at 365-66. The district court in Mortimer v. Delta Air Lines, *supra,* was even more explicit. Ruling on a motion to dismiss for lack of jurisdiction, the court stated:

> With respect to punitive damages, the Court will only note at this time that deterring similar acts in the future is of little significance in justifying their award since administrative relief is available to insure that end.

302 F.Supp. at 282. We agree with the *Mortimer* court. As there is no other basis for awarding punitive damages based on Allegheny's violation of section 404(b), the award must be reversed.

[41-43] We now turn to the award of punitive damages for misrepresentation. The trial judge gave the following reasons for his decision that punitive damages were appropriate:

> Since the Defendant herein intentionally engaged in substantial over-selling, and intentionally did not inform the public of this practice and the attendant risks, and intentionally sought to conceal such information from all its passengers and particularly from the victims of this practice, it is clear that the Defendants [sic] acted not only wantonly but with malice. They are, therefore, liable to both plaintiffs for punitive damages for their misrepresentation.

Nader v. Allegheny Airlines, Inc. *supra,* 365 F.Supp. at 133. It is fundamental that the trier of fact may find malice by drawing inferences from the defendant's conduct.

These deductions are findings of fact and are subject to the clearly erroneous standard. However, inferences based on a mistake of fact or of law must be reversed.

[44,45] Since punitive damages require a finding of malice or reckless disregard for the rights of others, the defendant's motivations are crucial. In the words of the late Dean Prosser: "Still less, of course, can such damages be charged against one who acts under an innocent mistake in engaging in conduct that nevertheless constitutes a tort." W. Prosser, Law of Torts, *supra*, § 2, at 10. However, despite Allegheny's argument to the trial court that an award of punitive damages would be contrary to Board policy because the Board had approved its practices, *see* Defendant's Trial Br. at 4-5, the trial judge never considered whether Allegheny reasonably believed that its policies were completely lawful and in fact carried the approval of the Board. Apparently, the trial judge did not consider this factor because he did not believe that Board involvement was relevant. In finding of fact no. 18, the trial judge stated:

> The Civil Aeronautics Board has not attempted to directly regulate the reservation practices of Allegheny or any other airline. . . . CAB regulations specifically contemplate full judicial redress as an alternative means for the vindication of the aggrieved party's rights, at his sole option.

Nader v. Allegheny Airlines, Inc., *supra*, 365 F.Supp. at 131 (citations omitted). Moreover, in finding of fact no. 21, he stated:

> The Defendant Allegheny Airlines . . . is a holder of a certificate of public convenience and necessity. As such it has a public duty and an especially large and high fiduciary obligation to make its policies

> known to all of its customers with regard to its intentional over-booking.

Id. at 132.

[46,47] In light of the Board's dominant role in determining whether Allegheny's policy of nondisclosure is or is not deceptive, and its continued exercise of jurisdiction to control the carriers' overbooking practices, we think that finding no. 18 is clearly erroneous. Also, we cannot accept the notion that air carriers *ipso facto* become fiduciaries and are held to a standard of full disclosure to the public merely because they possess a certificate of public convenience and necessity. While special obligations are sometimes imposed upon common carriers, the trial court offered no support for its interpretation of the scope of a certificate. If Congress had intended to import such significant extra duties to the carriers, some glimmer of its intent should be found in the statute or the legislative history. However, we have been unable to find such a message. *See* United States v. Bradley, 252 F.Supp. 804 (S.D.Tex.1966).

In short, on remand, if Allegheny's practices are found to be deceptive, and a judgment is entered against it, the trial judge must consider whether Allegheny had a good faith defense. Moreover, in drawing inferences from Allegheny's failure to disclose its policies, the trial judge cannot view Allegheny as a fiduciary.

V. CONCLUSION

For the reasons stated in part III of this opinion:

(1) the judgment entered in favor of Nader based on Allegheny's alleged violation of section 404(b) is reversed, and the district court is instructed to make new findings

of fact and conclusions of law in accordance with this opinion. In addition, the district court may take appropriate action to resolve conflicts in the evidence;

(2) the judgment in favor of CCAG based on fraudulent misrepresentation is reversed, and the district court is instructed to enter a judgment in favor of Allegheny on this issue; and

(3) the judgment entered in favor of Nader based on fraudulent misrepresentation is reversed, and the district court is instructed to stay further action on this issue in accordance with this opinion.

For the reasons stated in part IV of this opinion:

(1) the punitive damage award to Nader and CCAG is reversed. Punitive damages shall be awarded only on the terms set forth in this opinion.

So ordered.

FAHY, Senior Circuit Judge (concurring in part, dissenting in part):

I concur in the conclusion reached in the opinion of Judge Tamm for the court that the question whether appellee Nader was entitled to recover under section 404(b) of the Federal Aviation Act must be remanded for further consideration. I also concur in the conclusion of the court, assuming *arguendo* that Allegheny committed fraudulent misrepresentation, that appellee Connecticut Citizen Action Group (CCAG) is not within the class which can recover on that ground. Furthermore, I concur that punitive damages may not be awarded on the present record for a section 404(b) violation.

My dissent is due to the court's disposition of the claim of Mr. Nader based on allegedly fraudulent misrepresentation by Allegheny. The court holds that the finding of the District Court in that regard must be reversed and the

case stayed until the Board determines whether the reservation practices of the airlines are deceptive. In my opinion the finding by the District Court of fraudulent misrepresentation is ripe for review now by this court without reference to the Board, under section 411, of the reservation practices of the airlines. That section, entitled "Methods of Competition", provides as follows:

> The Board may, upon its own initiative or upon complaint by any air carrier, foreign air carrier, or ticket agent, if it considers that such action by it would be in the interest of the public, investigate and determine whether any air carrier, foreign air carrier, or ticket agent has been or is engaged in unfair or deceptive practices or unfair methods of competition in air transportation or the sale thereof. If the Board shall find, after notice and hearing, that such air carrier, foreign air carrier, or ticket agent is engaged in such unfair or deceptive practices or unfair methods of competition, it shall order such air carrier, foreign air carrier, or ticket agent to cease and desist from such practices or methods of competition. (Pub.L. 85-726, title IV, § 411, Aug. 23, 1958, 72 Stat. 769.)

The authority thus granted the Board looks only to the future cessation of practices determined by the Board to be unfair or deceptive. It does not either provide or preclude a remedy for past tortious conduct of a carrier injurious to an individual. Moreover, section 1106 of the Act provides:

> Nothing contained in this chapter shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this chapter are in addition to such remedies.

Pub.L. 85-726, title XI, § 1106, Aug. 23, 1958, 72 Stat. 798. 49 U.S.C. § 1506.

> Yet our court now holds,
> if the Board properly finds that a practice is not deceptive, a common law action for misrepresentation must fail as a matter of law.

I assume the court, by the language "properly finds", means finds in a manner which would meet judicial approval on review of such a finding made in the exercise of the Board's power under section 411, without such power being conditioned by the common law or section 1106 of the Act. I so assume because it is clear the court now vests the Board with decisional authority to determine that an individual who has suffered injury due to a carrier's fraudulent misrepresentation, and who otherwise would have a common law remedy, would have no such remedy should the Board determine the conduct was not deceptive. This position of the court that if the Board in a section 411 proceeding determines that a practice is non-deceptive then a common law action for fraudulent misrepresentation must fail as a matter of law seems to me to nullify section 1106. Moreover, the court thus divests itself not only of the authority to adjudicate a claim of fraudulent misrepresentation but also vests the Board with authority to define fraudulent misrepresentation in a manner which the courts must accept for the airline industry. I do not find that Congress has so provided or intended. Indeed, section 1106 seems to me clearly to the contrary. Section 411 affords, or denies, only a statutory remedy, unknown to the common law.

The court well describes the problem facing the airlines due to persons with reservations failing to "show". This problem continues to be of deep concern to the industry

and to the Board. It is the subject now of some regulation and further regulation is under consideration.[1] Clearly the matter is appropriate for such consideration and possibly additional regulation under section 411 and perhaps under other provisions of the Act. My disagreement with the Board and my colleagues is that the Act nevertheless falls short of eliminating judicial determination whether a particular factual situation such as now before us amounted to fraudulent misrepresentation.

If the present question were whether the bumping of Mr. Nader constituted a deceptive practice within the meaning of the Act, I would agree the matter would of course be within the primary jurisdiction of the Board. If, however, as I see it, the question now is whether he was the victim of fraudulent misrepresentation–a common law tort –it is for the court alone to decide. *Cf.*, Great Northern Ry. Co. v. Merchants Elevator Co., 259 U.S. 285, 290-91, 42 S.Ct. 477, 66 L.Ed.943 (1922), opinion by Brandeis, J.; Holloway v. Bristol-Myers Corporation, 158 U.S.App. D.C. 207, 485 F.2d 986, 989 (1973). Whatever this court should decide as to the claim of fraudulent misrepresentation–whether for or against Nader–the Board would be free to exercise its statutory authority. Thus, the respective jurisdiction of court and Board overlap;[2] but where

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[1] As pointed out by Judge Tamm the Board presently has the matter under consideration in Docket 26253, Emergency Reservation Practices Investigation. 39 Fed.Reg. 823 (1974).

[2] As this court stated in *Holloway, supra,* at 989, with respect to the Federal Trade Commission Act, so here, "Congress has superimposed a structure of Federal law upon the existing system of common law remedies for fraud and deceit without preempting or superseding the latter."

there is presented a claim of common law tort liability, as now, the jurisdiction of the court for its determination is independent of that of the Board.

Bumping may not be *per se* a deceptive practice. Moreover, it may not be the result of fraudulent misrepresentation, but when in a particular instance it is claimed to have been due to the latter the question is for the court to decide, though hopefully the need for resort to the court will be obviated when the practice is regulated not inconsistent with my position.

Texas & Pacific Ry. Co. v. Abilene Cotton Oil Co., 204 U.S. 426, 446, 27 S.Ct. 350, 51 L.Ed. 553 (1907), I think fails to support the court. In construing the Interstate Commerce Act, which lodged in the Interstate Commerce Commission decisional responsibility for the reasonableness of filed rates, the Court held that this purpose of the Act would be destroyed if a statutory reservation of a common law remedy were construed to vest this very question of reasonableness of rates in the courts independently of the Commission. In so holding, the Court emphasized the importance of preserving common law remedies, and explained its decision as follows:

> . . . we must be guided by the principle that repeals by implication are not favored, and indeed that a statute will not be construed as taking away a common law right existing at the date of its enactment, unless that result is imperatively required; that is to say, unless it be found that the pre-existing right is so repugnant to the statute that the survival of such right would in effect deprive the subsequent statute of its efficacy; in other words, render its provisions nugatory.

Id. at 437, 27 S.Ct. at 354.[3] The statute we now construe sets forth no specific conduct which is to be protected or prohibited by the Board under section 411.

There is no denying the broad scope accorded the expertise of regulatory agencies by the Supreme Court, especially where, as in the present case, the agency has been granted by Congress regulatory authority over a particular industry. Practices which would be held to offend another statute, such as the Sherman Act, have been permitted when approved in the public interest by the agency regulating the industry. Illustrative is Far East Conference v. United States, 342 U.S. 570, 72 S.Ct. 492, 96 L.Ed. 576 (1952). The case involved a Conference Agreement of steamship companies, approved by the United States Shipping Board under statutory authority. The question was whether a dual system of rates violated the Sherman Act, as the United States contended. The Court held the matter must be passed upon by the Federal Maritime Board before being decided by a District Court, describing the issue as the relation of the Sherman Act to the Shipping Act. Adhering to its previous analysis in United States Navigation Co., Inc. v. Cunard Steamship Co. Ltd., 284 U.S. 474, 52 S.Ct. 247, 76 L. Ed. 408 (1932), of the powers entrusted by Congress to the United States Shipping

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[3] See, also, Bell Telephone Company of Pennsylvania v. F.C.C., 503 F.2d 1250, 1280 (3d Cir. 1974), where the court notes:

> We have recognized that "a statute should not be considered in derogation of the common law unless it expressly so states or the result is imperatively required from the nature of the enactment." Bauers v. Heisel, 361 F.2d 581, 587 (3d Cir. 1966) (en banc), cert. denied, 386 U.S. 1021, 87 S.Ct. 1367, 18 L.Ed.2d 457, . . . *see also* Texas & Pacific Ry. v. Abilene Cotton Oil Co. . . . .

Board under the Shipping Act, the Court said it was "now firmly established, that in cases raising issues of fact not within the conventional experience of judges or cases requiring the exercise of administrative discretion, agencies created by Congress for regulating the subject matter should not be passed over." *Far Eastern Conference, supra,* 342 U.S. at 574, 72 S.Ct. at 494.

If we transpose it from its own context to that of the present case, the above language would arguably support the court's position except that the subject of fraudulent misrepresentation is within the conventional experience of judges. For other reasons I do not believe the situation we face justifies such transposition. Congress has expressly limited the present Board's authority by preserving common law remedies. In additon, the Supreme Court, in its recognition of the great public interest served by administrative law has never gone so far as to import into agency regulatory authority the right to approve a tortious injury to an individual, quite a different matter from exempting an industry from statutory accountability under the antitrust laws for conduct approved in the public interest under authority expressly granted by Congress.

Even where the present Board, under section 414 of the Act, 49 U.S.C. § 1384, is authorized to immunize from the antitrust laws conduct which it has approved in the public interest under other sections of the Act, as in *Far Eastern Conference, supra,* conduct which violates those laws but which has not been approved under the Act, is not exempted from their application. Aloha Airlines, Inc. v. Hawaiian Airlines, Inc., 489 F.2d 203 (9th Cir. 1973), rehearing denied, January 29, 1974. There the court, opinion by Tuttle, J., distinguished Hughes Tool Co. v. Trans World Airlines, 409 U.S. 363, 93 S.Ct. 647, 34 L.Ed.2d

577 (1973) and Pan American World Airways v. United States, 371 U.S. 296, 305, 83 S.Ct. 476, 9 L.Ed.2d 325 (1963), where antitrust problems "expressly entrusted to the CAB [the Board] are withdrawn from consideration by the Courts." The court reasoned as follows:

> In the case before us there is no order of the CAB authorizing the conduct which has been made the basis of the antitrust complaint filed by Aloha [Airlines]. HAL [Hawaiian Airlines] takes the position, however, that the fact that section 411 of the Act provides that the Board may, upon its own initiative or upon complaint by any air carrier, investigate and determine whether any air carrier has been or is engaged in unfair or deceptive practices or unfair methods of competition in air transportation and if it should find the existence of such practices, it shall issue a cease and desist order amounts to an explicit commitment of exclusive authority to the Board to deal in all aspects with charges of unfair competition.
>
> To be sure, *Pan American* [371 U.S. 296, 83 S.Ct. 476, 9 L.Ed.2d 325] held that the CAB had exclusive jurisdiction to halt certain alleged anticompetitive practices, but the alleged practices in that case had been the subject of specific orders of the CAB dealing with "the division of territories or the allocation of routes or . . . combinations between common carriers and air carriers" – all matters within the Board's primary jurisdiction under section 408 or section 409. In contrast, the CAB has not issued any orders authorizing or restraining HAL's past conduct of which Aloha complains.

The Court made it plain in *Pan American* that such jurisdiction was restricted to prospective relief since the Court said "[t]he Board has no power to award damages or to bring criminal prosecutions." This was noted at the point in which the Court was recognizing limitation on the kinds of relief that were committed to the Board. The dissenting opinion by Mr. Justice Brennan was based largely upon the distinction made by the Court between the granting of exclusive jurisdiction to the Board as to injunctive matters while leaving to the antitrust court the handling of damage claims.

We conclude, therefore, that the grant of authority to the Board by section 411 does not withdraw from the antitrust litigants the right to proceed for damages alleged to have occurred by reason of antitrust violations of the kind with which the Board has authority to deal only by issuing a cease and desist order.

489 F.2d at 208.

By comparable reasoning, section 411 does not withdraw from appellee Nader the right to sue for damages alleged to have occurred by reason of common law fraudulent misrepresentation.[4]

The court refers also to American Airlines Inc. v. North American Airlines, Inc., 351 U.S. 79, 76 S.Ct. 600, 100 L.Ed. 953 (1956). The case arose in a proceeding by the Board itself under section 411 to require North American

---

[4] I think this would be so even if the Board had previously approved bumping as not *per se* deceptive. The present case must rest upon its particular facts on the issue of fraudulent misrepresentations.

Airlines to cease and desist from using "North American" in its name in competition with the previously licensed American Airlines. No claim by American of a common law wrong or remedy was involved. In its opinion the Supreme Court pointed out that section 411 was modeled after section 5 of the Federal Trade Commission Act. We had stated in *Holloway, supra,* that the remedies of section 5 were additional to rather than in derogation of the common law remedies for fraud and deceit:

> This Act [the Federal Trade Commission Act] does not purport to affect a consumer's right to obtain damages in a common law action sounding in fraud or deceit, or in any expansion of that action that may evolve in common law jurisprudence.

485 F.2d at 999. The Supreme Court in *American Airlines,* however, observed that section 5 of the Trade Commission Act was "concerned with purely private business enterprises," and differed from a statute where, as in our case, Congress has committed the regulation of a particular industry to an agency of special competence to deal only with that industry's problems. Our court now reasons from this difference that the common law remedies for fraud and deceit cannot remain totally unaffected by section 411. I agree to the extent that the Board may add to common law remedies, and require a carrier to cease and desist unfair and deceptive practices, as in *American Airlines,* but I find no support in that case for a view that the Board has power to eliminate a common law private action for fraudulent misrepresentation by deciding that past conduct of that character by an airline in a particular case was not a deceptive practice.

I do not intimate that should the court sustain the finding of the District Court of fraudulent misrepresentation

the punitive damages awarded by the District Court would also be sustained.

I respectfully dissent from that part of the decision of the court which defers decision of the Nader claim of fraudulent misrepresentation to await Board determination whether the reservation practices of the airlines are deceptive.[5]

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[5] It is not clear to me that increased passenger fares need follow from the position I hold, even should it result in some readjustment within the over-all economics of the industry operating free of fraudulent misrepresentation. Moreover, I am unable legally to justify barring the courts from according a remedy for injury found after fairly conducted judicial proceedings to have resulted from the fraudulent misrepresentation of an airline.

APPENDIX B

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

RALPH NADER and the CONNECTICUT CITIZEN ACTION GROUP,

Plaintiffs,

v. Civil Action No. 1346-72

ALLEGHENY AIRLINES, INC.,

Defendant.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This case came on to be heard before the Court, sitting without a jury, and the Court, having considered the evidence introduced at the trial, the stipulations entered into by the parties, and upon consideration thereof including the arguments of counsel as well as the trial briefs, hereby makes the following Findings of Fact and Conclusions of Law.

Findings of Fact

1. Plaintiff Ralph Nader is a citizen of the United States and resides in the District of Columbia.

2. Plaintiff Connecticut Citizens Action Group (hereinafter CCAG), is a non-profit corporation, organized and existing under the laws of the District of Columbia and has its principal place of business in Hartford, Connecticut. It is a public interest advocate for environmental and consumer issues arising in the State of Connecticut.

3. Defendant, Allegheny Airlines, Inc., is a corporation having a principal place of business at the Washington National Airport near Alexandria, Virginia. It is an air carrier and holds a certificate of public convenience and necessity issued by the Civil Aeronautics Board and is regulated by the laws of the United States relating to such

carriers and by the rules, regulations and orders promulgated by the CAB in accordance with the Federal Aviation Act of 1958.

4. In the early spring of 1972, CCAG became involved in a controversy over proposed public utility rate increases in Connecticut. CCAG had planned to hold a rate-payers rally on April 28 to raise public support in the Hartford area for CCAG's efforts to oppose pending electric utility rate increases in particular and for the group's consumer rights activities in general. Mr. Nader, who assisted in the organization of CCAG in April 1971 was scheduled to appear in Storrs, Conn. on April 28, 1972. The director of CCAG ascertained that Mr. Nader would be available and willing to appear as the keynote speaker for the rally, which was then planned to be held over the luncheon hour in downtown Hartford and adequately in advance of Mr. Nader's later appearance that day at Storrs.

5. On Tuesday, April 25, 1972 Plaintiff Nader made a confirmed reservation for Allegheny Flight 864, scheduled to depart Washington National Airport at 10:15 a.m. on April 28, 1972 with arrival at Hartford, Connecticut's Bradley International Airport at 11:15 a.m.

6. In reliance upon Mr. Nader's confirmed reservation on Allegheny's Flight 864 on April 28, 1972, CCAG's representatives began on Wednesday, April 26, 1972 to distribute flyers for the 12:15 p.m. rally on April 28, 1972. CCAG had also planned to use the noontime rally to take advantage of Mr. Nader's great popularity and influence in the State of Connecticut to generate "spill over" contributions in CCAG's 1972 fund drive. Also based on Mr. Nader's commitment the CCAG was able to enlist the appearance of the Mayor of Hartford and President of the City Counsel at the rally to endorse CCAG's efforts.to be allowed to intervene as full parties in the State's utility rate proceedings. As a result of these efforts at least 1,000 people arrived for the rally just before the scheduled stated time.

7. Plaintiff Nader's ticket was picked up from a travel agent in downtown Washington, D.C. on the morning of April 28, 1972. On the same morning he arrived at approximately 10:05 a.m. at the main terminal building of Washington National Airport. He was advised to proceed to Gate 17 on the lower level. There, upon presentation of his confirmed reservation and ticket he was denied boarding on Flight 864 because it had been oversold by the Defendant Allegheny Airlines, Inc.

8. The Plaintiff Nader then inquired of Allegheny Agent at Gate 17, John McDonald, as to whether there were any stand-bys already on board the plane or whether there were any passengers who would volunteer to give him his seat. Mr. McDonald refused to make either inquiry.

9. The Plaintiff Nader informed Mr. McDonald at the departure gate of the likely harm that would occur to him and Plaintiff CCAG if the Defendant refused to honor his confirmed reservation, but all Mr. McDonald did was to offer the Plaintiff Nader another flight to Hartford via Philadelphia on a fifteen-passenger plane which was scheduled to arrive in Hartford at 12:10 p.m., some 55 minutes after the scheduled arrival of Flight 864 in Hartford on April 28, 1972. As a result of Allegheny's conduct, Mr. Nader incurred $7.00 in long distance telephone expenses and $3.00 in the additional cost of a ticket to Boston. (From Boston Mr. Nader travelled by car to Storrs.)

10. CCAG's director informed the crowd at the rally that Mr. Nader could not appear as scheduled. The crowd of 1,000 dwindled to about 200 persons who remained to hear the Mayor, the Council President and CCAG's Director, Mr. Moffett, speak. CCAG lost the contributions expected to be generated both at the rally and by canvassing and direct mail solicitations of persons whose names were to be obtained at the rally or as a result thereof. Therefore, CCAG suffered extreme and very real embarrassment, loss of professional esteem and prestige throughout the

State of Connecticut as a result of Mr. Nader's failure to appear as advertised. CCAG also incurred $50 to send a car to Boston to pick up Mr. Nader and transport him to Storrs.

11. Allegheny Airlines has a practice of systematically overbooking its flights by accepting more confirmed reservations and selling more tickets for a flight than the number of seats which are actually available on its aircraft.

12. Over-booking by Allegheny is substantial. In April, 1972, according to the record herein the company bumped 945 persons, and during the period from January 1969 through August 1972 some 15,929 persons were not accommodated on Allegheny flights for which they had confirmed reservations. During April, 1972, 18 Allegheny flights between Washington and Hartford were over-sold or overbooked with the result that some 48 confirmed reservation-passengers were left stranded.

13. Allegheny is and was at all times pertinent herein aware of the fact that its over-booking practice inevitably resulted in denials of boarding to some persons on some flights who held confirmed reservations, and it is further aware that this practice does in fact cause severe distress and financial loss to persons who rely upon confirmed reservations.

14. Through advertising and other means Allegheny holds itself out and represents itself to the public that it offers reliable reservation policies which, if available and confirmed, will assure any prospective passenger of a seat on the flight designated in the confirmed reservation.

15. There is nothing in the advertising of the defendant which makes the public aware of the Defendant's practice of intentional over-booking of its flights or the fact that this over-booking practice does in fact create a substantial risk that confirmed reservations will be dishonored. Nor is the public advised in detail of the over-booking

practice in the tariffs filed with the CAB or of the fact all members of the Air Transport Association, of which the Defendant is a member, intentionally sell more tickets than they have seats for their particular flights. In fact, the Court finds that the Defendant and its agents conceal their over-booking practice from the public and furthermore did so in this case, which intentional over-booking resulted in financial harm and damages to each of the Plaintiffs herein.

16. Prior to April 28, 1972 neither Plaintiff was made aware of Allegheny's intentional over-booking policy or of the fact that Flight 864 between Washington and Hartford in particular was intentionally over-booked. The fact that Plaintiff knew from previous experience that other airlines such as American and Eastern over-booked flights, did not make either Plaintiff aware of the fact that the Defendant in the case at bar did this or that it also engaged in such practices.

17. Each Plaintiff relied on the Defendant's confirmation of the Plaintiff Nader's reservation as an assurance that he would be accommodated and allowed to board Flight 864 and as a result of such reliance each of the Plaintiffs were injured by virtue of Mr. Nader's inability to arrive in Hartford, Connecticut as scheduled.

18. The Civil Aeronautics Board has not attempted to directly regulate the reservations practices of Allegheny or any other airline, but it does require all airlines to tender certain compensation to passengers who are denied boarding on a flight. Such compensation represents liquidated damages for "bumping" claims against the carrier, if accepted. CAB regulations specifically contemplate full judicial redress as an alternative means for the vindication of the aggrieved party's rights, at his sole option. 14 C.F.R. § 250.8 (Tr. 160-61).

19. Forthwith upon denying boarding to Mr. Nader, Allegheny conveyed to him a written instrument containing

an offer of settlement, acceptable within 60 days, of his claims arising from the incident, thereby acknowledging its actual notice thereof and waiving any requirement for further action on his part within any shorter period.

20. Allegheny's tariff rule requiring written notice of claims within 45 days, if not waived, was literally complied with, since (a) the company's own employee delivered to its offices on the day of the denial of boarding a writing describing the incident and setting forth the amount to be offered to Mr. Nader as liquidated damages, and (b) the tariff does not specify how or by whom the required writing must be given; and (c) a denied boarding transaction is not completed before the tendered compensation is either accepted or rejected by the recipient, and written notice was given to Allegheny by Mr. Nader's representative contemporaneously with the rejection of its settlement offer. Moreover, by its own terms, the rule is inapplicable to the instant case, which involves a claim for damages arising out of Defendant's discrimination, fraudulent misrepresentation and intentional tortious conduct.

21. The Defendant Allegheny Airlines is a common carrier which is licensed or authorized to do business by the Civil Aeronaturics Board, as hereinbefore stated, and is the holder of a certificate of public convenience and necessity. As such it has a public duty and an especially large and high fiduciary obligation to make its policies known to all of its customers with regard to its intentional over-booking. The fact that it conceals such practices in its advertising and otherwise, and, by virtue of its failure and refusal to take reasonable steps to avoid harm to the Plaintiffs herein is tantamount to willful and wanton misconduct which gives rise to and provides a proper basis for each of the Plaintiffs' claims for damages.

Conclusions of Law

1. This Court has jurisdiction over the subject matter (28 U.S.C. 1331, 1332, 1337), *Fitzgerald* v. *Pan American*

World Airways, 229 F.2d 499, 502 (2nd Cir., 1965); moreover, the amount in controversy, exclusive of interest and costs, exceeds $10,000.00. The Court also has pendant jurisdiction over any non-federal claims, *United Mine Workers* v. *Gibbs*, 383 U.S. 715 (1966).

2. The Plaintiff, Mr. Nader, is entitled to both compensatory and punitive damages under the antidiscrimination provisions of the Federal Aviation Act of 1958, Section 404(b), 49 U.S.C. § 1374(b). Mr. Nader has established a *prima facie* case of unreasonable discrimination: He possessed a confirmed reservation and ticket, and the resultant right to a seat. The Defendant, who intentionally over-sold the seats, did not honor that priority. The Defendant has failed to sustain its burden of proof that the discrimination was reasonable by demonstrating company policy and why, in this particular case, its policy did not work an "undue or unreasonable prejudice or disadvantage in any respect whatsoever" to Mr. Nader, where the Defendant permitted passengers with subsequent or no reservations to have priority over a passenger with a confirmed reservation who had not been informed of the risks attendant to the Defendant's concealed policy of over-booking. *Archibald* v. *Pan American World Airways*, 460 F.2d 14, 16-17 (9th Cir. 1972); *Kaplan* v. *Lufthansa German Airlines*, 12 CCH Avi. Law Rep. 17, 933 (E.D. Pa., Civil No. 68-2611, decided 4/9/73); *Mortimer* v. *Delta Air Lines*, 302 F. Supp. 276, 278 (N.D. Ill. 1969); *Wills* v. *Trans World Air Lines, Inc.*, 200 F. Supp. 360 (S.D. Cal., 1961).

3. The Defendant, through its agents, servants and employees, knowingly and intentionally misrepresented a material fact, namely that Mr. Nader had a guaranteed reservation for a seat, upon which each of the Plaintiffs relied. *Accord, Isen* v. *Calvert Corp.*, 379 F.2d 126 (D.C. Cir. 1967); *see Sankin* v. *5410 Connecticut Avenue Corp.*, 281 F. Supp. 524 (D.C.D.C. 1968), *aff'd sub nom. Benn* v. *Sankin*, 133 U.S. App. D.C. 361, 410 F.2d 1060 (1969),

cert. denied, 396 U.S. 1041 (1970). In light of all the evidence in this case, the Plaintiffs' reliance was reasonable and resulted in the injuries and damages which they incurred. It was foreseeable that the Defendant's intentional misrepresentation would be relayed to other members of the public and that they would rely upon the Defendant's representation since the Defendant's legal duty is to provide the public with reliable air transportation under its certificate of public convenience and necessity.

4. CCAG is eligible and entitled to recover herein for damages it has incurred due to the Defendant's intentional misrepresentation even though they were not direct parties to the transaction in issue because: (1) the misrepresentation was knowingly and intentionally made; privity of contract is not required here; (2) CCAG was within the class of foreseeable plaintiffs (the class is determined by the Defendant's legal duty to the public at large both under its license and by its better position to prevent injury to the public by full disclosure of its practices affecting the public); (3) CCAG made a reasonable reliance on the misrepresentation and was thereby damaged. *See* Prosser, "Misrepresentation and Third Persons," 19 Vand. L. Rev. 231, 246, 250 (1966); 37 C.J.S., Fraud § 61; 37 Am. Jur. 2d, Fraud and Deceit § 298; *Cf. Rush Factors, Inc.* v. *Levin,* 284 F. Supp. 85, 90 (1968).

5. Other than $50 CCAG has not proven its claim for actual damages with sufficient legal precision to permit a specific award of compensatory damages. Even though CCGA probably was less successful in their fund drive due to the loss of prestige and dampening of the drive's momentum when Mr. Nader failed to appear at the rally, their actual loss in fund solicitation is too speculative to provide a basis for an award of compensatory damage. However, the Defendant's intentional misrepresentation did constitute an invasion of CCAG's legal rights, and,

therefore, CCAG is entitled to nominal damages. *Chesapeake & Potomac Tel. Co.* v. *Clay,* 90 U.S. App. D.C. 206 194 F.2d 888, 890 (1952). *See, Cook Industries, Inc.* v. *Carlson,* 334 F. Supp. 809 (D.C. Miss 1971); *Oklahoma Natural Gas Corp.* v. *Municipal Gas Co. of Muskogee,* 113 F.2d 308 (10th Cir. 1940).

6. Punitive damages are awarded against a tortfeasor to punish him for the good of the community for his outrageous conduct and to deter others from such conduct. *Chesapeake & Potomac Tel. Co.* v. *Clay,* 90 U.S. App. D.C. 206, 194 F.2d 888, 891 (1952). Since the Defendant herein intentionally engaged in substantial overselling, and intentionally did not inform the public of this practice and the attendant risks, and intentionally sought to conceal such information from all its passengers and particularly from the victims of this practice, it is clear that the Defendants acted not only wantonly but with malice. They are, therefore, liable to both plaintiffs for punitive damages for their misrepresentation.

7. Under the Federal Rule and the rule of this district, compensatory damages need not be shown to establish a basis for the assessment of punitive damages. E.g. *Wardman-Justice Motors, Inc.* v. *Petrie,* 59 U.S. App. D.C. 262, 39 F.2d 512, 516 (1930). Therefore, although the proven damages of the plaintiffs are a nominal sum, the plaintiffs may recover punitive damages.

8. The forty-five (45) day time within which actions may be maintained against the Defendant as set forth in its tariff on file with the CAB is no bar to maintaining this action because of the following:

(a) Shortly after dishonoring Mr. Nader's reservation on Flight 864, the Defendant sent him a written instrument, giving him sixty (60) days within which to accept in complete settlement of all claims against the Defendant; and

(b) The aforesaid sixty (60) day offer of settlement and tender of liquidated damages was a written acknowledgement of the Defendant's actual notice of Plaintiffs' claims and thereby waived any further action on Plaintiff's part within a lesser period of time; and

(c) The rule is inapplicable to claims for damages for personal injuries arising out of the Defendant's discriminatory, deceitful and intentional tortious conduct; and

(d) The CAB consumers' guide states that passengers have at least 90 days to file a claim, coterminous with the three-month period carriers are required to maintain their ticket records.

CONCLUSION

By virtue of the foregoing, an order will be entered of even date herewith awarding the Plaintiff Nader $10.00 in compensatory damages and $25,000 as punitive damages of and from the Defendant. The Plaintiff CCAG is awarded $51.00 in nominal damages and $25,000 in punitive damages, of and from the Defendant.

/s/ CHARLES R. RICHEY
Charles R. Richey
United States District Judge

DATED: October 18th, 1973

ORDER

This cause came on for trial before the Court sitting without a jury on September 4, 1973, and the Court having heard the testimony and having examined the proofs offered by the respective parties, and having filed herein of even date its Findings of Fact and Conclusions of Law, and having directed that judgment be entered in accordance therewith,

Now, therefore, by reason of said law and findings, it is this 18th day of October, 1973,

ORDERED that Judgment be entered against the Defendant, and that the Defendant pay to Plaintiff Nader $10 in compensatory damages and $25,000 in punitive damages, and pay to plaintiff Connecticut Citizens Action Group $51 in nominal damages and $25,000 in punitive damages; and it is

FURTHER ORDERED, that the Plaintiffs shall have judgment against the Defendant for their costs.

/s/ CHARLES R. RICHEY
Charles R. Richey
United States District Judge

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1974
June 23, 1975

No. 73-2243

RALPH NADER, et al.

v.

ALLEGHENY AIRLINES INC.,
Appellant

BEFORE: Fahy, Senior Circuit Judge; McGowan and Tamm, Circuit Judges.

ORDER

On consideration of appellees' petition for rehearing, it is

ORDERED by the Court that appellees' aforesaid petition is denied.

Per Curiam

For the Court:

/s/ Hugh E. Kline
HUGH E. KLINE
CLERK

Senior Circuit Judge Fahy would grant the petition for rehearing as to that part of the case as to which he has filed a dissenting opinion.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 73-2243 September Term, 1974
June 23, 1975

* * * * *

ORDER

Appellees' suggestion for rehearing *en banc* having been transmitted to the full Court and no Judge having requested a vote thereon, it is

ORDERED by the Court *en banc* that appellees' aforesaid suggestion for rehearing *en banc* is denied.

For the Court

/s/ Hugh E. Kline
HUGH E. KLINE
Clerk

Supreme Court, U. S.
FILED
JAN 9 1976
MICHAEL RODAK, JR., CLERK

JOINT APPENDIX

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-455

RALPH NADER,

Petitioner,

v.

ALLEGHENY AIRLINES, INC.,

Respondent.

ON A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR WRIT OF CERTIORARI FILED SEPTEMBER 22, 1975
CERTIORARI GRANTED NOVEMBER 11, 1975

INDEX TO JOINT APPENDIX

Note: The relevant orders and opinions of the United States District Court for the District of Columbia in Civil Action No. 1346-72 and the United States Court of Appeals for the District of Columbia Circuit in No. 73-2243 are set forth in the appendices to the Petition for Certiorari and are not reprinted here.

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

RALPH NADER and
CONNECTICUT CITIZEN ACTION
GROUP,

Plaintiffs.

v.

ALLEGHENY AIRLINES, INC.,

Defendant.

Civil Action No. 1346-72

Complaint For Compensatory and Punitive Damages

Plaintiffs allege as follows:

1. This action arises under the laws of the United States regulating interstate and foreign air commerce, U.S.C. Title 49, Sections 1301 et seq., and particularly U.S.C. Title 49, Section 1374. This Court has jurisdiction under U.S.C. Title 28, Section 1337 and U.S.C. Title 28, Section 1332. The amount in controversy exceeds the sum of $10,000, exclusive of interest and costs.

2. Plaintiff Ralph Nader is a citizen of the United States and resides in the District of Columbia.

3. Plaintiff Connecticut Citizen Action Group (hereinafter referred to as CCAG) is a non-profit corporation, organized and existing under the laws of the District of Columbia and having its principal place of business at 57 Farmington Avenue, Hartford, Connecticut. Plaintiff CCAG is a public interest advocate for environmental, consumer and human rights issues arising throughout the State of Connecticut, which has been supported and sponsored by Plaintiff Nader since its inception.

4. Defendant Allegheny Airlines, Inc., is a corporation, having its principal place of business at National Air-

port, Washington, D.C., and at all times relevant herein transacted business and maintained offices in the District of Columbia, at 16th and K Streets, N.W., at Washington National Airport, and at other locations within the said District.

5. Defendant is an air carrier engaged in interstate commerce pursuant to a certificate of public convenience and necessity issued by the Civil Aeronautics Board and is regulated by the laws of the United States relating to such interstate commerce and by the rules, orders and regulations promulgated by the Board in accordance with the Federal Aviation Act of 1958.

6. Prior to April 28, 1972, Defendant advertised publicized and published tariffs stating that it transported passengers on a reservation basis by jet aircraft on scheduled flights between Washington, D.C. and Hartford, Connecticut.

7. Defendant knew or should have known that passengers and others alike rely heavily upon such representations and upon the confirmed reservations and tickets which are sold by Defendant for transportation on particular flights.

8. Several days prior to April 20, 1972 Plaintiff Nader's representative contacted Defendant and requested a reservation for Plaintiff Nader for one seat on Allegheny flight 864 from Washington National Airport to Hartford, Connecticut, on the morning of Friday, April 28, 1972.

9. Defendant's agent represented to Plaintiff Nader's representative that Defendant had made a reservation which would assure him passage from Washington on Allegheny flight 864 scheduled to depart on April 28, 1972, provided he purchased his ticket at least 30 minutes prior to flight time.

10. Plaintiff Nader's representative communicated to Plaintiff CCAG the fact that Plaintiff Nader had a reservation on flight 864 on April 28, 1972 and would be arriving at Bradley Field in Hartford, Connecticut on that flight.

11. Early on the morning of April 28, 1972 Defendant's agent, Ober Steamship and Tour Agency, issued a ticket to Plaintiff Nader for Allegheny flight 864 to depart Washington National Airport at 10:15 a.m. on April 28, 1972.

12. At the time the ticket was issued Defendant's agent marked the symbol "OK" in the status column of the ticket thereby confirming the previously made reservation in writing.

13. The Defendant intended by its representations aforesaid to induce the Plaintiffs to rely upon its said representations so that Plaintiff Nader's travel arrangements would not be made with any other competitor of Defendant.

14. When Plaintiff Nader arrived at the gate at National Airport where flight 864 was boarding on April 28, 1972 several people, some of whom had tickets and had not yet been boarded, were also present at the gate.

15. Plaintiff Nader presented his ticket to Defendant's gate agent and was then informed by this agent that the flight had been oversold and that all seats had been taken.

16. At this point Plaintiff Nader explained to Defendant's agents at the gate that he was due to speak to a fund-raising rally organized by and for Plaintiff CCAG, which was to occur at noon that day, and that if he didn't appear on schedule, the rally would be ruined.

17. The purpose of the rally was to organize citizen opposition to utilities rate increases, raise funds for CCAG's public interest work and to give interested citizens the opportunity to hear Plaintiff Nader speak on consumer issues. Plaintiff Nader was to be introduced at the rally by the Mayor of Hartford, Connecticut. The rally and Plaintiff Nader's appearance were heavily advertised both on the radio and by leaflet distribution for several

days prior to April 28, 1972. Plaintiff CCAG anticipated a crowd well in excess of 2,000 persons and planned to raise substantial funds through the sale of bumper stickers and other similar items.

18. In making such plans and arrangements, Plaintiff CCAG relied on the expectation that Plaintiff Nader would be accommodated on flight 864 for which he had a confirmed reservation.

19. After being informed that the flight had been oversold and he would not be accommodated, Plaintiff Nader then asked Defendant's agent, in view of his urgent circumstances, to ascertain whether standby passengers had been improperly boarded in lieu of persons holding confirmed reservations, and to recheck whether Plaintiff Nader could be accommodated.

20. Defendant's agent refused to board Plaintiff on flight 864.

21. Other persons holding confirmed reservations were also denied boarding on flight 864.

22. Defendant's refusal to accommodate Plaintiff Nader on flight 864 was in breach of its contract with Plaintiff Nader.

23. Defendant's refusal to accommodate Plaintiff Nader was in violation of its published tariff.

24. Plaintiff Nader then requested Defendant's agents to explain his situation to the passengers already boarded on flight 864 and ask if any such passengers would volunteer to take a later flight in order to allow Plaintiff Nader to get to Harford in time for the rally.

25. Defendant's agents refused Plaintiff Nader's request described in paragraph 24.

26. No other certificated airline service was available at that time to transport Plaintiff Nader to Hartford in time for the rally.

27. Defendant's flight 864 departed Washington National Airport approximately on schedule at about 10:15 a.m. on April 28, 1972, and said flight arrived at Hartford approximately on schedule that morning.

28. Defendant in fact sold more seats for flight 864 on April 28, 1972 from Washington to Hartford than were available on the aircraft.

29. Plaintiff Nader was forced to take next available flight to Boston, Massachusetts in order to arrive in time for an engagement that afternoon in Storrs, Connecticut, thereby incurring additional charges for airfare in the amount of $3.00, plus other costs and expenses for Plaintiffs.

30. As a direct and proximate result of Defendant's conduct, the Director of Plaintiff CCAG had to and in fact did appear before an expectant crowd of hundreds of persons and inform the audience that Plaintiff Nader had missed his flight and would not appear. Consequently, the purpose of the meeting was frustrated, the large anticipated turn-out failed to materialize, no funds were raised, the publicity work of a large number of CCAG supporters and volunteers went for naught and the reputation, esteem, and fund-raising ability of Plaintiff CCAG was seriously damaged and impaired.

31. Defendant knew that it could not assure passage to Plaintiff Nader on flight 864 on April 28, 1972 or other flights on Defendant's system because such flights had been and were being consistently over-reserved and oversold.

32. Defendant knew that ticket holders with confirmed reservations were regularly being denied space on such oversold flights and that any prospective passenger on any such flight might be denied accommodation on such flight despite holding a confirmed reservation.

33. Defendant failed to inform Plaintiff Nader, at any time prior to his arrival at Washington National Airport to

take flight 864, of the possibility that his confirmed reservation might not be or would not be honored because of Defendant's practice of overbooking such flights.

34. Defendant arbitrarily and capriciously denied Plaintiff Nader passage and at the same time afforded passage on said flight to one or more persons holding tickets issued subsequent to this ticket or to persons otherwise not entitled to occupy the space reserved and confirmed for Plaintiff Nader by Defendant's agent, thereby subjecting Plaintiff Nader to unjust discrimination, or undue or unreasonable prejudice or disadvantage.

35. Defendant regularly overbooks, on a confirmed reservation basis, various of its flights including flight 864 with the result that said flights are frequently oversold, and regularly subjects ticket holders with confirmed reservations on said flights to unjust discrimination or undue or unreasonable prejudice or disadvantage by arbitrarily and capriciously refusing passage to ticket holders with confirmed reservations without regard to their contractual rights, and by arbitrarily and capriciously allowing passage to other persons not entitled to the space which Defendant's had previously contractually reserved.

36. Defendant's actions as aforesaid were knowing, and were undertaken in such conscious and deliberate disregard of the interests of its prospective passengers and others that such actions were willful, wanton and accomplished in willful disregard of the provisions of Defendant's own tariffs and the Federal Aviation Act of 1958 (49 U.S.C. 1301 et seq.).

WHEREFORE, Plaintiffs demand judgment against the Defendant as follows:

1. Plaintiff Nader demands compensatory damages in the amount of $10.00 and punitive damages in the amount of $50,000.00 together with interest, costs of this suit, and such other or further relief as the Court may deem proper.

2. Plaintiff CCAG demands compensatory damages in the sum of $100,000.00 and punitive damages in the sum of $100,000.00 together with interest, costs of this suit, and such other or further relief as the Court may deem proper.

PLAINTIFFS DEMAND TRIAL BY JURY AS TO ALL ISSUES.

[Names and addresses of
counsel omitted in printing]

UNITED STATES DISTRICT COURT, DISTRICT OF COLUMBIA
[Title omitted in printing]

Answer

First Defense

The Complaint fails to state a claim upon which relief can be granted against the Defendant Allegheny Airlines, Inc.

Second Defense

The Complaint fails to state a claim upon which punitive damages can be granted against Defendant Allegheny Airlines, Inc.

Third Defense

This action does not appropriately belong within the jurisdiction of this Court in that it challenges the legality and propriety of Defendant Allegheny's reservation and denied boarding practices, which considerations are by law assigned to the Civil Aeronautics Board and not to the courts.

Fourth Defense

This action is barred for the failure of the Plaintiffs to comply with Rule 40(B), Tariff C.A.B. 142, Local and Joint Passenger Rules Tariff No. PR-6 in that they failed to present to Defendant Allegheny a written notice of claim within 45 days of the alleged occurrence of the events giving rise to this claim.

Fifth Defense

1. Defendant Allegheny admits the allegations of paragraphs 5, 6, 8, 11, 12, 15, 20, 21, 24, 25, 27, and 28 of the Complaint.

2. Defendant Allegheny admits the allegations of paragraph 4 of the Complaint except that National Airport is in Washington, D.C. which Defendant denies.

3. Defendant Allegheny denies the allegations of paragraphs 7, 9, 13, 18, 22, 23, 29, 30, 31, 32, 34, and 36 of the Complaint.

4. Defendant Allegheny is without knowledge or information sufficient to form a belief as to the truth of the averments in paragraphs 2, 3, 10, and 17 of the Complaint.

5. Defendant Allegheny admits the allegations of paragraph 16 of the Complaint except that it is denied that Plaintiff Nader told the Defendant's agent that the rally would be ruined if he failed to appear.

6. Defendant Allegheny admits the allegations of paragraph 19 of the Complaint and avers that Defendant's agent did take the actions requested by Plaintiff Nader as described in said paragraph 19 of the Complaint.

7. In answer to paragraph 14 of the Complaint Defendant Allegheny states that the time Plaintiff Nader arrived at the gate from which Flight 864 was departing the boarding of Flight 864 had been completed. Two people were at the gate at that time with tickets, but they had not been boarded.

8. In answer in paragraph 26 of the Complaint Defendant Allegheny alleges that Plaintiff Nader was offered transportation on Allegheny Commuter Flight 145 from Washington to Philadelphia connecting with Allegheny Flight 906 to Hartford, Connecticut, scheduled to arrive in Hartford at 12:10 p.m., 55 minutes after the arrival of Plaintiff Nader's ticketed flight.

9. In answer to paragraph 33 of the Complaint Defendant states that Plaintiff Nader was already aware of the possibility that a confirmed reservation would not be honored because of the reservation practices of airlines, and Defendant avers that Plaintiff Nader was aware that the possibility of such denied boarding increases when the passenger arrives at the boarding gate after the conclusion of the boarding of the airplane and at the time that the flight was scheduled to take off, as Plaintiff Nader did in this instance.

10. In answer to paragraph 35 of the Complaint Defendant Allegheny states that Defendant, in an effort to minimize the effect of the no-show passenger problem upon Defendant and the public, accepts a limited number of reservations in excess of flight capacity based upon statistical studies of the percentage of likely cancellations and no-shows on each flight. The remainder of paragraph 35 is denied.

11. The allegations of injuries and damages in the Complaint are denied, as are all other allegations of the Complaint not specifically answered above.

[Names and addresses of counsel omitted in printing]

RELEVANT DOCKET ENTRIES

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

[Title omitted in printing]

1972

Jul 7—Complaint, appearance Jury Demand—filed.

Jul 7—Summons, copies (1) and copies (1) of Complaint issued serv. 7-13.

Jul 31—Stipulation enlarging time for defendant Allegheny Airlines to answer complaint to 8-16-72.

Aug 8—First set of interrogatories of plaintiffs to defendant; c/m 8-8.

Aug 10—Change of address of Don W. Crockett.

Aug 16—Motion of defendant for summary judgment; exhibit A, B; statement; P & A; c/m 8-16. Appearance of William A. Bradford Jr.

Aug 16—Motion of defendant for extension of time to answer interrogatories; P & A; c/m 8-16.

Aug 22—Request of plaintiffs for production of documents; c/m 8-21.

Aug 25—Memorandum of P & A by plaintiff in opposition to motion for summary judgment; table of citations; affidavit, exhibit A, B, C, D; c/m 8-24.

Aug 25—Request of plaintiffs for oral argument on defendants motion for summary judgment.

Aug 25—Memorandum of P & A by plaintiff in opposition to defendants motion to delay answering interrogatories; c/m 8-24.

Aug 25—Motion of defendant for extension of time to respond or object to plaintiffs request for production of documents; P & A; c/m 8-25. M. C.

Aug 30—Memorandum of plaintiffs in opposition to delay production of documents; c/m 8-29.

Sep 1—Supplemental memorandum of defendant in support of its motion to extend time to respond to interrogatories and to document requests; supplementary memorandum of defendant in support of motion for summary judgment; affidavit; attachment A; c/m 9-1.

Sep 20—Response of plaintiffs to defendants supplementary memorandum; c/m 9-18.

Sep 29—Order denying defendants motion for summary judgment. (N) Richey J.

Sep 29—Order extending the time in which defendant Allegheny Airlines, Inc., may respond or object to the plaintiffs request for Production of Documents 20 days after the Court has ruled on the defendants motion for Summary Judgment. (N) Richey J.

Oct 6—Motion of deft to amend order of 9-29-72; P&A; Exhibit; c/s 10-6-72 M.C.

Oct 12—Motion of defendant for amended order heard & denied. (Order to be presented) (Reporter: T. Dourian) Richey J.

Oct 12—Opposition of defendant to motion for an amended order; c/s. Richey J.

Oct 12—Order denying motion of defendant for an amended order. (N) Richey J.

Oct 12—Notice of defendant to take deposition of Ralph Nader; c/m 10-12.

Oct 20—Response of defendant to plaintiffs request for production of documents; c/m 10-20.

Oct 20—Answer of defendant to complaint; c/m 10-20. Appearance of William A. Bradford, Jr.; Hogan & Hartson.

Oct 20—Answer of defendant and objections to plaintiffs first set of interrogatories; exhibit 1; c/m 10-20.

Nov 21—Notice of defendant to take deposition of Toby Moffett; c/m 11-21.

Dec 11—Motion of plaintiffs to compel answers to interrogatories and production of documents; P & A; exhibits A & B; c/m 12-8.

Dec 15—Memorandum of P & A by defendant in opposition to plaintiffs motion to compel; c/m 12-15.

Dec 29—Reply of pltfs to deft's memorandum of P & A; c/m 12-27.

1973

Jan 18—Recommendation allowing in part and denying in part Pltf's motion to compel answers to interrogatories and for production of documents; Pretrial Examiner.

Jan 25—Opposition of Pltf's. to recommendation of Pretrial Examiner; Appendix A: c/m 1-25.

Jan 29—Objection of deft. to recommendation of the Pretrial Examiner. c/m 1/29/73.

Feb 7—Reply of pltfs to deft's objections to recommendations of Pretrial Examiner. c/m 2/6.

Feb 16—Order affirming the recommendation of the Pretrial Examiner entered on 1/18/73. (N) Richey, J.

Apr 27—Deposition of Ralph Nader for the deft.

May 9—Supplemental response of deft to request for production of documents; attachments. c/s 5-9.

May 9—Supplemental response of deft to pltf's interrogatories. c/s 5-9.

May 10—Calendar Call: Withdrawal of Jury demand; Trial set 9-7-73, 9:30 a.m. (Rep: T. Dourian) Richey, J.

May 10—Order setting trial for 9-7-73, 9:30 a.m.; setting out the courts instructions to counsel. (N) Richey, J.

May 14—Affidavit of verification by David B. Armstrong; c/m 5/14/73.

Jun 8—Deposition of Anthony John Moffett, Jr. for deft.

July 13—Request of pltff. for production of documents; set II; c/m 7/13/73.

July 31—Deposition of John McDonald for the pltffs.

Aug 9—Motion of deft. for protective order; P&A. c/m 8-9.

Aug 14—Opposition of pltfs. to motion for protective order. c/s 8-13.

Aug 15—Response of defts. to request for production of documents. c/m 8-15.

Aug 16—Order denying defts. motion for a protective order; directing Leslie O. Barnes to appear 8-20-73 at 10:30 a.m. for deposition. (N) Richey, J.

• • •

Aug 30—Trial brief of deft. c/m 8-30.

Aug 30—Objections of deft. to pltfs proposed documentary exhibits. c/m 8-29.

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Aug 30—Trial brief of pltffs.

Aug 30—List of exhibits of pltffs.

Sept 4—Trial by Court begun; respited until 2:00 p.m. 9-10-73. (Rep: T. Dourian) Richey, J.

Sept 4—List of deft. exhibits.

Sept 10—Trial by Court resumed; concluded; taken under advisement. (Rep: T. Dourian) Richey, J.

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Sept 17—Proposed Findings of Fact & Conclusions of Law by deft. c/m 9-17.

Sept 17—Post-Trial memorandum by pltfs. table of cases, appendix A, B, C & D. c/m 9-17.

Oct 18—Findings of Fact, Conclusions of Law, and Order entering Judgment against the deft. and directing that deft. pay to pltf. Nader $10.00 in compensatory damages and $25,000 in punitive damages and pay to pltf. Conn. Citizens Action Group $51.00 in nominal damages and $25,000 in punitive damages and pltf. shall have judgment against deft. for costs. (N) Richey, J.

• • •

Nov 16—Notice of appeal by deft. from order of 10-18-73. Copies mailed to Reuben B. Robertson, III and Don Crockett. Deposit $5.00 by Roberson.

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UNITED STATES COURT OF APPEALS
FOR THE
DISTRICT OF COLUMBIA CIRCUIT

[Title omitted in printing]

12-28-73	Certified Original Record (2 volumes of transcript and one envelope containing Exhibits (n)
1-25-74	25-Briefs for amicus curiae (The Air Transport Association of America)
1-28-74	25-Appellant's Brief (m-28)
1-28-74	10-Appellant's Appendix (m-28)
3- 4-74	25-Appellees' brief (p-4)
3-18-74	25-Appellant's reply brief (m-18)
6-28-74	4-CAB's motion for leave to file brief as amicus curiae out of time (m-28)
7- 5-74	4-Appellees' memorandum in opposition to motion of Civil Aeronautics Board for leave to file untimely amicus curiae brief (m-3)
7-25-74	Per Curiam order that the Clerk is directed to file the brief of the C.A.B. as amicus curiae; the time for filing appellees' reply to the amicus curiae brief, if any, is extended to August 24, 1974; Fahy, Sr. CJ and McGowan, CJ
7-25-74	25-Brief for C.A.B. as amicus curiae (m-28)
8- 5-74	4-Appellees' motion to extend the time to file a reply to Amicus Curiae Brief to September 16th (Ok RB) (m-2)
8-14-74	Per Curiam order by the Clerk for the Court granting appellees' motion to extend time to reply to the brief amicus curiae of the CAB and the time for filing appellees' brief is extended to September 16, 1974
9-17-74	15-Appellees' reply to Brief Amicus Curiae of the CAB (m-16)
11-29-74	Clerk's order sua sponte, placing this case on the summary calendar

12- 6-74	4-Appellees' motion for full oral argument (p-6)
12- 9-74	Clerk's order denying appellees' motion for full oral argument
12-10-74	Argued before McGowan and Tamm, CJ; The Court announced that Sr. CJ Fahy is a member of this panel of the Court but is unable to be present; the case will be submitted to him on the briefs and tape recording of oral argument
5- 2-75	Opinion for the Court filed by Circuit Judge Tamm.
5- 2-75	Opinion filed by Senior Circuit Judge Fahy, concurring in part and dissenting in part
5- 2-75	Judgment reversing and remanding case to the District Court. (n)
5-16-75	11-Appellees' petition for rehearing and/or suggestion for rehearing en banc (m-16)
6-23-75	Per Curiam order denying appellees' petition for rehearing; Fahy, Sr. CJ; McGowan and Tamm, CJ; Sr. Circuit Judge Fahy would grant the petition for rehearing as to that part of the case as to which he has filed a dissenting opinion
6-23-75	Per Curiam order by the Clerk for the Court, en banc that appellees' suggestion for rehearing en banc is denied
7- 1-75	Copy of opinion and certified copy of judgment and bill of costs in the amount of $2,726.30 issued to District Court.

Excerpts From Transcript of Trial

UNITED STATES DISTRICT COURT, DISTRICT OF COLUMBIA

[Title omitted in printing]

Washington, D.C.

September 4, 1973

The above-entitled matter came on for trial before the Honorable Charles R. Richey, United States District Judge, at ten o'clock a.m.

APPEARANCES

For the Plaintiffs:

REUBEN B. ROBERTSON, ESQ.

For the Defendant:

FRANK ROBERSON, ESQ., and

WILLIAM A. BRADFORD, JR., ESQ.

• • • • • • • • • •

[2] The Clerk: Civil Action 1346-72, Ralph Nader and others versus Allegheny Airlines.

• • • • • • • • • •

[3] Mr. Robertson: Yes, Your Honor. There is no disagreement with the defendant's exhibits.

The Court: All right. All defendant's exhibits may be admitted?

Mr. Robertson: So far as I am concerned, that is fine.

• • • • • • • • • •

[4] The Court: In other words, as I understand it, Mr. Roberson, on behalf of the defendant, would admit and offer no objection to 1, 3, 4, 5, 6, 7, 8, 9, 10, 11 and 12?

Mr. Roberson: That is correct, sir.

The Court: All right. Let us go back to 2. You had better argue that, because I am not sure I understand it.

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[8] The Court: Let me say this, Mr. Roberson:

As you obviously know, the court is sitting without a jury, and I believe the court can give it the appropriate weight. It may have no bearing on any issue in this case,

and I am not ruling, by letting it in, that it does at this point. I am going to receive it for what it is worth at this time.

• • • • • • • • • •

[9] (Plaintiffs' Exhibits 1 through 13, inclusive, received in evidence, respectively.)

The Court: Now, let us go on to Exhibit 14.

Now, they admit the authenticity of letters of complaint, but Mr. Roberson says that these letters are objected to on the grounds they have no relevancy to the plaintiffs' experience on April 28th.

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[12] The Court: All right. I will admit those, but these three letters that came afterwards, I will deny them.

(Plaintiffs' Exhibit No. 14 received in evidence, as above set forth.)

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[13] The Court: All right.

How about 23?

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The Court: I do not think it is binding on the court. I can take judicial notice that such an order exists and receive it for what it is worth. But I do not, frankly, at this juncture, see how it is going to help the court or be dispositive of the issues in the case.

Mr. Robertson: No, Your Honor, and, indeed——

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The Court: I will receive it for what it is worth, [14] and at this point you have to convince me that it is worth a whole lot, because I do not see where it is worth very much.

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(Plaintiffs' Exhibit No. 23 received in evidence.)

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Ralph Nader

was called as a witness, and, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Robertson:

Q. Mr. Nader, would you state your full name for the record, please? A. Ralph Nader.

Q. Are you a resident of Washington? A. Yes.

Q. What is your profession? A. Lawyer.

• • • • • • • • • •

[15] Q. Mr. Nader, do you remember when you purchased your ticket for Flight 864 on April 28th? A. Very early in the morning.

• • • • • • • • • •

Q. Had you made a reservation for the flight in advance? A. Yes, a reservation was made in advance.

Q. Do you remember how far in advance, approximately, sir? A. Several days, about three days in advance.

Q. What was the purpose of this trip to Hartford? A. It was to attend a fund-raising rally in downtown [16] Hartford, as well as to attend a number of other gatherings throughout the State of Connecticut.

Q. And when you say "attend," did you have any particular function to perform at those rallies? A. Yes, I was to speak at the rallies.

Q. How far in advance was this trip planned? A. At least three weeks. The day was planned for a number of gatherings around the state on behalf of the Connecticut Citizen Action Group.

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Q. What is the Connecticut Citizen Action Group? A. It is a citizens' group that dedicates its effort in a non-profit manner to consumer, environmental, legislative, governmental rights.

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[17] Q. What time did you get to the airport on April 28th? A. About four or five minutes after 10:00.

Q. Where were you at that time? A. At the Allegheny ticket counter.

Q. That is upstairs, as you got out of the cab? A. Yes, it is on the ground floor of the airport.

Q. How do you remember that time? How did you know it at that time?

• • • • • • • • • •

A. When I left downtown Washington at about 20 of 10:00, I noticed that it was taking longer than it usually takes to get to the airport. Since the plane was leaving at [18] 10:15, I looked at my watch when I arrived at the Allegheny counter, pursuant to looking at the board to see what gate number the plane was leaving from.

Q. What did you do after you got there? A. I went right to the gate.

Q. And how long did it take you to get there? A. About three minutes.

Q. What time did you arrive at the gate? A. About 10 after 10:00. My watch is usually a minute or a minute and a half fast, but it was 10 after 10:00, I would say.

Q. What time was the flight scheduled to leave? A. At 10:15.

Q. Was the plane still there when you arrived? A. Oh, yes.

Q. What happened when you arrived at the gate? A. There were people milling around in front of the ticket lift desk, so to speak, and the person in front of me was a person I had known, John Koskinen, who was an aid to Senator Ribicoff.

• • • • • • • • • •

Q. What happened when you presented the ticket to the [19] agent? A. When I presented the ticket to the agent, the agent indicated that there was no more room on the plane.

Q. Do you remember exactly what the agent said? A. He said, in so many words, there is no more room. The plane is full.

Q. Did you tell him you had a reservation? A. I did.

Q. What did you tell the agent about the nature of your trip? A. I told him that I had to make an important speech in downtown Hartford, and it was very important that I get on the plane.

I asked him if he would check to see if there were any stand-by's on the plane, because it has been my experience that stand-by's are given secondary priority.

Q. Did he tell you whether there were any stand-by's or not? A. He indicated simply that the plane was full. He had constantly repeated that phrase, and that he could not do anything about it.

Q. Did you ask him to do anything else to help get you on board? A. Yes, I asked him if he would send his representative or go to the plane—they were milling back and forth at the [20] time—and ask if anybody on the plane would desire to volunteer to take a later plane because of the urgency of the trip.

• • • • • • • • • •

By Mr. Robertson:

Q. When you asked the agent to see whether there were any volunteers on board who might take a later flight, sir, so [21] that you could make your engagement, what did he say to you then? A. He said he was sorry, but he couldn't do anything about that.

Q. Did he refuse to seek any volunteers? A. Yes, by virtue of his statement.

Q. And at this time was the plane still at the gate? A. Yes.

Q. What did you do then? A. Then I went to the telephone—no, prior to that I asked him what else could be done, in effect, as other people were asking him, in the same situation. He said he would possibly see; that there might be another connection that could be made.

Q. What was the other connection that he told you about? A. He said there might be another connection via Philadelphia to Hartford, but that it was a close scheduling problem.

Q. Did he say how close it was? A. I don't recollect exactly, other than it occurred to me that sometime in that two- or three-minute span of frantic exchanges, and so forth, there was indicated a ten-minute connection time, if the plane from Washington landed as scheduled in Philadelphia.

Q. Did he say whether or not he could assure that the connection in Philadelphia would definitely be made? A. No, he did not say he could assure it at all.

Q. Did he say he could not assure it? [22] A. He said he could not assure it, in so many words.

Q. Do you recall what time this proposed connecting flight was supposed to arrive in Hartford if it did make the connection? A. At 12:15.

Q. That is the best of your recollection? A. Yes.

Q. Would that be in time for the rally? A. No, it would not.

Q. What time was the rally scheduled for? A. It was my understanding that the rally was scheduled for 12:00 noon. A 12:15 arrival, with time to get a cab at Bradley Field and time to get into Hartford, would have brought me at the designated area no earlier than 10 or 5 of 1:00.

Mr. Roberson: Your Honor, I object to that and move it go out. It is not responsive.

The Court: Overruled.

Mr. Roberson: May I say that the actual time of the rally—he was asked what was the time of the rally. Well, the actual time of the rally was 12:15, not what he thought it was. It was not noon.

The Court: Well, I think he said 12:15, if I understood him correctly.

Mr. Roberson: No, he said he thought it was noon, Your Honor.

[23] The Court: Now, what did he say, Mr. Reporter? Did he say 12:15 or did he say noon?

(A portion of the record was read back by the reporter, as follows: "Question: What time was the rally scheduled for? Answer: It was my understanding that the rally was scheduled for 12:00 noon.")

The Court: All right.

By Mr. Robertson:

Q. Your recollection and your understanding upon which you base your testimony was that the rally was scheduled for 12:00? A. Yes, sir.

• • • • • • • • • •

Q. Did you know exactly what time the rally was scheduled for? A. My understanding is that it was a noon rally.

Q. Did you know exactly what time the rally was scheduled for? A. Yes.

[24] Q. Did you know exactly what time you were expected to arrive? A. Yes. At that point at the Allegheny desk, ticket desk, it was my clear understanding that it was a noon rally.

Q. Fine. What would have happened if the Philadelphia connection had been missed? A. If the Philadelphia connection had been missed, I would have, in effect, been stranded in Philadelphia and would not have been able to make other engagements in the State of Connecticut that afternoon.

Q. Did you notify anyone about being bumped off the flight? A. Yes, I called Mr. Moffett via Mr. Jacobs.

Q. Who is Mr. Moffett? A. Mr. Moffett is the director of the Connecticut Citizen Action Group in Hartford.

Q. And who is Mr. Jacobs? A. My associate.

• • • • • • • • • •

Q. What was the nature of that conversation? [25] A. To relate to Mr. Moffett that I could not obtain a seat on the Allegheny flight; that the suggested connection via

Philadelphia was a very tight one; and it had two risks inherent in it:

One, I might not be able to get out of Philadelphia if the plane arrived late in Philadelphia for the connection and, second, and most important, even if everything went as scheduled and the plane arrived at 12:15, I would not have been able to get into downtown Hartford, which is about 20 or 25 miles away, until just before 1:00 o'clock.

Q. Do you know how many calls were made to Mr. Moffett? A. I think two calls were made?

Q. Two at that time? A. Yes.

Q. Were there any later calls made to Mr. Moffett? A. Yes, there was a second call, again through Mr. Jacobs, indicating that the best plan would be to take an American Airlines flight to Boston and have somebody pick me up at Logan Airport.

• • • • • • • • • •

The Witness: And drive me to Storrs in Connecticut, [26] which was my next engagement.

• • • • • • • • • •

Q. And approximately how much was spent on your long-distance telephone calls? A. About $7.

Q. What flight did you take, then? A. I did take the American Airlines flight. It left sometime between 11:00 and 12:00. I don't know the exact time to Boston from Washington.

Q. Why did you not take the air taxi connection? A. For two reasons:

One, there was no assurance that it would get to the Allegheny flight in time that was leaving Philadelphia. I believe there is about a 10-minute span there.

And, secondly, that even if it did, it would have arrived too late for me to get a cab to go all the way down to downtown Hartford in time for the lunchtime rally.

Q. What happened when you arrived at Boston? A. A representative of the Connecticut Citizen Action Group

picked me up in the car and drove me to Storrs in Connecticut.

Q. Were you in time for your engagement there? A. I was late.

Q. Do you remember how late you were? A. About 25 minutes or so.

[27] Q. Were you informed by Allegheny prior to the flight at any time that it overbooked its flights? A. No.

Q. Were you informed by Allegheny or warned in any way that there was a risk of being denied boarding on its flights? A. No.

• • • • • • • • • •

Q. Were you warned in advance or told in any manner that Flight 864, in fact, was overbooked for that day? A. No.

Q. Were you aware of this? A. No, I was not.

Q. If you had known in advance of the risk that you might not get on the flight, what action would you have taken? A. I would have taken an earlier flight.

• • • • • • • • • •

[28] Q. What was your anticipation as to how you were going to get to Hartford on the 28th of April? A. Well, since I had a confirmed reservation on that Allegheny flight, I fully anticipated there would be a seat available for me on the aircraft when I arrived at the gate.

Q. Did you rely on this, in fact, in making your plans and your commitments? A. I certainly did.

Q. Were you ever bumped by Allegheny before? A. I was not.

Q. Were you ever bumped on any other airline flights? A. Yes.

Q. How many times have you been bumped? A. Twice before that, as I can remember.

Q. On what occasions did this happen? A. About six months previously, an Eastern Airlines flight bumped me, and five other people, on a flight to Miami. Just a few

days before the Allegheny flight, an American Airlines flight bumped me.

Q. Did this not make you aware that Allegheny does overbook its flights, and your reservation was subject to this kind of risk? A. No, it did not.

Q. Well, why not? A. For two reasons:

[29] One, the two incidents did not relate to Allegheny. They were not relevant to Allegheny's behavior.

And, second, against all the flights that I had taken in the past, these were the only two times, one of which might have been understandable because of the fact of an airline strike on a competing route to Miami.

• • • • • • • • • •

The Court: There was not any strike in connection with the American Airlines flight?

The Witness: And there was not any strike in connection with the American.

The Court: Did you have a confirmed reservation in each of those instances?

The Witness: Yes, I did.

• • • • • • • • • •

By Mr. Robertson:

Q. In each of those cases were you put on another flight that got you in time to your destination or shortly after? A. Yes, there were some delays, however, obviously.

Q. So in either of those cases, were you given any boarding compensation? A. No. To finish my answer to your last question, against the number of flights that I had taken, two flights in that type of situation certainly were not enough to dismantle [30] my anticipation of reliability.

Q. Well, did you understand from these incidents that there was a pattern of systematic and intentional overbooking throughout the airline industry? A. No, it was always explained as accidental, or what have you, but certainly not as policy.

• • • • • • • • • •

Cross-Examination

By Mr. Roberson:

Q. Mr. Nader, do you remember having your deposition taken in this case on November 13, 1972, when you were asked under oath certain questions with respect to this incident? A. I do.

Q. Since that deposition, have you read the deposition that was also taken of Mr. Moffett, the director of your Citizen—Connecticut Citizen Action Group? A. Yes, I have.

Q. Have you learned from reading Mr. Moffett's deposition that his recollection and his testimony was different from your deposition testimony as to when the arrangements were made for you to make a speech in Hartford? A. Yes, I have.

Q. Is that why you changed from saying on your deposition [31] that you had agreed at least three weeks in advance with Mr. Moffett to now saying that it was somewhat less than three weeks? A. It was a refreshing of my recollection. You see, there was an overlap here. The agreement for the day's trip was made at least three weeks in advance, but the agreement for the particular speech was made in less time. Reading that deposition refreshed my recollection on that point.

Q. Well, you knew that I was not asking you about some other speech; that I was asking you about the Hartford speech, was I not? A. Yes.

Q. And you did testify unequivocally that you made that at least three weeks in advance? A. There was a confusion of the overlap, yes.

Q. To respond to my question—— A. Yes.

Q. (Continuing)—you did so testify without any equivocation, didn't you? A. I would have to see my testimony.

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Q. Was this question asked, and did you answer this way at page 13 of your deposition:

"Question: How long in advance had you agreed to be present [32] for this meeting, the speaking engagement?

"Answer: At least three weeks, I would say."

Was that question asked you, and did you answer that way?

The Court: What page?

Mr. Roberson: Page 13, sir.

The Court: All right.

By Mr. Roberson:

Q. Was that question asked you on your deposition, and did you respond in the way that I just read it? A. Yes.

Q. And you testified in your deposition that you made that speaking arrangement directly with Mr. Moffett by telephone, didn't you? A. It was made either—I could not recollect whether it was made directly with his office or through Miss Colmore simply because the general day's activities were discussed with Mr. Moffett. Apparently, the specific speech, itself, was arranged about a week before its date through Miss Colmore's office in New York.

Q. Is this another instance where you are cleaning up your deposition testimony a little bit after reading Mr. Moffett's deposition? A. Just clarifying confusion.

Q. Were you asked this question at page 14 of your deposition, and did you respond this way:

[33] "Question: Is he the one [speaking of Mr. Moffett] that you agreed with to speak?

"Answer: Yes."

A. To speak during the day, yes, sir.

Q. And your answer was just "yes"? A. Yes.

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[36] Q. Now, both of these exhibits, F and G, give the starting time of this rally as 12:15, do they not? A. I will take your word for it.

Q. I would rather you would look at it? A. Fine. Well, this one does not. Yes, it does. Fine. Both of them do.

Q. They both do, don't they? A. Yes.

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[37] Q. But, in any event, your information or your understanding was that it would arrive at Bradley Field, which is the name of the Hartford Airport, at about 12:15, isn't that right, Mr. Nader? A. At about 12:15.

Q. You have later learned from your friend, Mr. Koskinen, who at that time was an aid to Senator Ribicoff, that it did arrive at about that time, isn't that correct? A. That is correct.

Q. You know that they did make the Philadelphia connection, don't you? A. They made an illegal Philadelphia connection.

Q. Did I ask you anything about whether it was a legal [38] or illegal connection? A. In the interests of accuracy——

Q. Did I ask you anything about whether it was illegal or legal, the Philadelphia connection? A. No.

Q. It did make its Philadelphia connection, did it not, sir? A. Yes.

Q. And it got to Hartford at approximately twelve—— A. Yes, that is correct.

Q. Wait until I finish the question. And it got to Philadelphia at approximately 12:15? A. As Mr. Koskinen told me.

Q. And the distance, the airline distance, betweeen Constitution Plaza where this rally was to be held and Bradley Field is—I mean the direct route would be—eleven-and-a-half miles, would it not? A. I don't know the miles. I know the time it takes from experience.

Q. You are a native of Connecticut, are you not? A. Yes.

Q. Have you spent a good deal of time in Hartford? A. Yes.

Q. Almost the entire route, whatever the distance, between Bradley Field and Constitution Plaza, you are on expressways, [39] are you not? A. Well, certainly, except until you get into the city, which is not expressway.

Q. Does not Interstate 95 go within a couple of blocks of Constitution Plaza? A. Yes, as it was recently constructed.

Q. Was it in existence in April of 1972? A. Yes.

Q. So you would have traveled that distance, whatever it is, almost all the way on expressways, wouldn't you? A. Yes, I think so.

Q. Now, had you arrived at 12:10, could you not travel the distance down on these expressways at that time of day in time to have arrived at a rally starting at 12:15 before it broke up? A. No.

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Q. You could not make it in 30 minutes? [40] A. It is close. I takes you about 10 minutes to get a cab, once you step off the airplane and go up the labryinthic corridors to find a cab.

Q. Sometimes it takes you ten minutes; sometimes it takes you less, does it not? A. My experience is ten minutes.

Q. Would it not be possible for you to have one of your associates or the Connecticut Citizen Action Group there on hand at the airport to meet you so you would not have to wander around the airport looking for a taxi? A. That would have taken longer, because they would have had to park the car. They do not allow any loitering at the very narrow gate space.

Q. I did not ask you whether it would taken taken longer. I asked you was it not possible. A. Could you rephrase the question again?

Q. Read the question to the witness, please.

(The last question was read back by the reporter, as requested.)

By Mr. Robertson:

Q. Would you answer that question? A. Yes.

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[41] Q. You were not the only speaker down there at this rally, were you? A. My understanding is that I was.

Q. Didn't you understand that the mayor was going to make a speech and some councilman was going to make a speech, among others, at this rally? A. My understanding is that they were to be just brief introductions.

Q. You knew they were going to say something to whatever audience was assembled, didn't you? A. Yes.

Q. Have you learned, in fact, that the rally didn't break up until 12:45? A. I learned that the remnants of the rally terminated at about 12:45.

Q. In other words, if you could have traveled the distance between the airport and the downtown site of the rally in 30 minutes, Constitution Plaza, you would have gotten there before everybody left, would you not? A. I would have gotten there before everybody left. That is correct.

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[42] Q. As a matter of fact, you were a half hour late over at Storrs, Connecticut. It was supposed to start at 2:00 p.m., and you got there around 2:30, didn't you? A. Around 2:25.

Q. If Mr. Moffett testified 2:30, he is incorrect about that? A. Most people do not, you know, have a bell on their watch. My estimate is 2:25. If his estimate was 2:30, then we have to take each estimate as to its value.

Q. To answer my question, if Mr. Moffett testified that it was about 2:30 that you got there, then he was wrong about that? A. No, about 2:30 could be 2:25.

Q. And the audience was still there when you arrived, were they not, at Storrs, Connecticut? A. The college audience was still there.

Q. Was the difference between those two rallys that you were getting a fee at Storrs, Connecticut; whereas, you were speaking free over in Hartford, or were to have spoken free; was that a difference between those two rallys? A. No, because I was not getting a fee in either place, sir.

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[44] Q. Well, if an announcement had been made to the assemblage that Mr. Nader had been delayed, but would be there before the rally was over, do you not think that that would have had some effect to hold the crowd? A. No, I don't, because most of the audience——

Q. I did not ask you why. I just asked you: do you not think that. A. Okay. No.

Q. You could have taken a flight up to Hartford the night before, which would have made it certain that you would be there both for your rally in Hartford and get over to Storrs in time, could you not? A. If I were not overbooked.

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Q. Your answer is that you could have taken a flight the previous evening which would have gotten you there in plenty of time, isn't that right, sir? A. If I could have obtained a reservation, counsel, and [45] if I were not overbooked.

Q. And there are other airlines than Allegheny that serve Hartford, are there not? A. Yes.

Q. Now, are there also trains and buses that go to Hartford? A. May I correct my answer. You said there are other airlines that serve Hartford.

Q. Yes. A. I know there is one other scheduled airline. I don't know if there are other "airlines".

Q. What is the other one? A. Eastern.

Q. There are also morning flights, earlier morning flights than 10:15, that would have gotten you there in time, in plenty of time for your rally, isn't that so? A. Yes, again subject to those two qualifications.

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Q. What time was this Flight 864 scheduled to have arrived in Hartford? A. Again, I believe it was about an hour after it was [46] scheduled to depart, which would have made it roughly 11:15.

Q. Which would have made you only 45 minutes before the time that you thought your rally was supposed to begin, namely, noon? A. That is correct.

Q. And you say that you could not have gotten at that time of day between the airport and downtown Hartford, Constitution Plaza, in 30 minutes' time? A. I could not have gotten—to answer your question precisely, I could not have gotten there before 30 minutes' time.

Q. So you were cutting it pretty thin, even if everything had gone well for you, were you not? A. There was 15 minutes' leeway. I would not call that thin.

Q. You think, then, that you could have gotten downtown in 30 minutes? A. I think I could have gotten downtown before 12:00, I have no idea what the traffic problems were at that time.

Q. Well, if you got down there at five minutes to 12:00, you would not have been 15 minutes before you thought the rally was going to start; you would have been there five minutes ahead, would you not? A. I would have been there in time for the rally.

Q. You would have been there five minutes before noon, [47] would you not? A. Under what assumption?

Q. If you had arrived there at 40 minutes after you left the airport? A. That is right.

Q. You know that airline schedules are not 100 per cent certain to come off, do you not? A. Yes.

Q. Planes are sometimes late? A. That is right.

Q. Sometimes there are mechanical difficulties in getting off the ground? A. Yes.

Q. If this rally were so important to you, why did you not take an earlier flight, to take care of these possibilities? A. For two reasons:

One, Allegheny has a policy of informing its people if there are mechanical problems ahead of time—three reasons, rather.

Second, I felt that I could rely on Allegheny's scheduling in this particular circumstance. It is a well-traveled route, and they have back-up planes.

And, thirdly, I had work to do.

Q. Eastern Airlines is a well-traveled route, is it not, sir? [48] A. Between what points, counsel?

Q. Eastern Airlines is a busy airline? A. Yes.

Q. American Airlines is a busy airline? A. Yes, sir.

Q. You had been denied boarding because of overbooking on both of these airlines in recent times, had you not? A. Recent times, in what time frame——

Q. Recently, as of the 28th of April, 1972? A. Yes.

Q. As a matter of fact, the incident on American Airlines had occurred on the previous Sunday of April, 1972, isn't that correct? A. Yes.

Q. So you were fully aware that sometimes airlines overbook, and because of that, confirmed reservations do not get you on the plane; you knew that, didn't you? A. No, because they did not tell me they were intentionally overbooking or even overbooking.

Q. Did they tell you that after you arrived, and they denied you passage? I am talking about Eastern Airlines and American Airlines, now. A. They did not use the words.

Q. Well, they tendered you these denied-boarding compensation cards, didn't they? [49] A. Yes. Excuse me. Could you describe it a little more precisely?

Q. Do you not know that under the CAB regulations, when a passenger is denied boarding because of overbooking, the airline is required, then and there, to tender him what they call a denied-boarding card that explains the overbooked passenger's rights? You knew that because you had been given those by Eastern Airlines and American Airlines, had you not? A. I know I was given it by Eastern Airlines. I wanted to make sure you were not referring to the ticket.

Q. No. I am talking about the notification of your rights. A. Yes.

Q. You knew that? A. Yes.

Q. And you got one of those from Eastern, and you also got one five days previously from American, did you not?

A. I don't recollect that I received it. It might have been tendered or put in my ticket, you know, just stashed in my ticket.

Q. Well, as a matter of fact, when this incident occurred, Mr. Nader, involving Allegheny and Mr. McDonald, the service representative of Allegheny, advised you that, unfortunately, they could not get you on the plane because of an oversale, didn't he, than and there, tender you this denied-boarding notice card, [50] setting forth your rights, and didn't you say, "Never mind, I have got one from American"? Didn't you tell him that, in substance? A. What I think I told him was that I had already been offered one from American. I did not signify that I accepted it, as I recollect.

Q. But, in any event, you had on occasion read these things, so you knew what your rights were in the event of oversales, didn't you? A. You will permit me to more restrictively define your definition of "rights". I knew what they said were my rights, sir.

Q. You knew that, among your rights, you were entitled to denied-boarding compensation, didn't you? A. Yes.

Q. So you knew, when you booked—— A. Excuse me. Under certain conditions, rights to denied-boarding compensation.

Q. So you knew, when you had a confirmed ticket on Allegheny Airlines, that it was not at all certain that you would be, in fact, boarded on that plane; you had within five days experienced failure to get on under similar circumstances, had you not? A. No.

Q. Didn't you tell us that on the 23rd of April, 1972, [51] on an American Airlines flight from Washington to Boston, you were denied boarding because of an oversale? A. "Under the similar circumstances" means that they informed me that the plane was overbooked. They did not inform me that the plane was overbooked, in so many words.

Q. They gave you a denied-boarding compensation card which explained your rights; American Airlines did that,

did they not? A. Yes, but that did not indicate any overbooking or any intentional overbooking.

Q. Whether it is intentional or not, you knew that you were entitled to denied-boarding compensation by virtue of those recent experiences; didn't you know that? A. Yes, but I would not——

Q. And that is the reason you did not accept the denied-boarding card from Mr. McDonald, or declined to take it, isn't that so? A. Because I already knew what it said.

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Q. Mr. Nader, you did not personally file a notice in writing with an official of Allegheny Airlines to the effect that you were going to make a claim arising out of this incident within 45 days of the incident, did you? A. Not in writing, myself.

[52] Well, nobody did on your behalf within 45 days, did they? A. Not in writing.

Q. Your counsel that you retained to file a lawsuit is not the same counsel that is trying the case here for you, is it? A. That is correct.

Q. You had a Mr. Crockett? A. That is correct.

Q. And you placed the matter in his hands? A. Yes, sir.

Q. And you are aware that it was not until June 19, 1972, that he wrote to National Airlines—not National, but Allegheny Airlines, saying that he intended to file a complaint arising out of this incident? A. That is right.

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Q. On the morning of this flight, what time did you leave your home, Mr. Nader? A. Sometime between 8:00 and 9:00.

[53] Q. Do you live in downtown Washington? A. Yes.

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Q. And then what time did you actually depart downtown Washington to the airport? A. Twenty of 10:00.

Q. This was on a Friday? A. Yes.

Q. This was on a Friday, was it not? A. Yes.

Q. You know Friday to be a heavy-travel day, do you not? A. Not particularly in the morning.

Q. Your answer is that you do not think it is on Friday in the morning? A. No.

Q. Particularly heavy? A. No.

Q. If you left downtown Washington at 20 minutes to 10:00 to catch a 10:15 flight, was that not, in itself, cutting it a little thin? A. No.

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[54] Q. And, in fact, it took you some 25 minutes to make the trip on this morning, this Friday morning, isn't that so? A. Yes, longer than I anticipated.

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The Witness: It took probably 25 or 24 minutes, to be exact.

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[55] Q. You learned that this particular flight was boarding at Gate 17, didn't you? A. That is right.

Q. And that is some over 1000 feet and on a different level from the Allegheny ticket counter, isn't it? A. I understand from your calculations is was 1037 feet, sir.

[56] Mr. Roberson: Your Honor, there is a stipulation that was entered into at the deposition that it is 1037 feet between the Allegheny counter where he came in and Gate 17 where this flight was boarding. That was a stipulation between counsel at the time of the deposition.

The Court: All right.

By Mr. Roberson:

Q. Did you walk or did you run that 1037 feet, Mr. Nader, on this morning? A. I walked very fast.

Q. You were not worried about missing the plane? A. No.

Q. When you got to the ticket lift position at Gate 17—incidentally, that was at the extreme end of a long corridor, was it not? A. Yes.

Q. When you got there, you recognized John Koskinen? A. Yes, I did.

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[57] Q. How long have you known Mr. Koskinen? A. Oh, about two years, prior to that time.

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Q. In any event, he was already there at the scene ahead of you, was he not? A. Yes.

Q. Did you learn later that, or did you learn at that time that, Mr. Koskinen had already been denied boarding? A. I learned that at the time of arriving at the ticket lift gate.

Q. And was there another young man—I don't expect you to remember his name—who was also denied boarding on this flight? A. I could not say exactly. There were a number of [58] people in that vicinity. I could not distinguish who was denied or who was just a relative seeing somebody off or whatnot.

Q. You knew that at least one was denied boarding in addition to you and Mr. Koskinen, though, didn't you? A. I would not say precisely. I knew there were some others, but I did not know precisely how many.

Q. And you knew that the others had arrived at that ticket lift position ahead of you, didn't you? A. I would assume some did, yes.

Q. You were the last one that was denied boarding to arrive at the ticket lift position, were you not? A. So far as I know.

Q. Did you learn the name of this Allegheny representative that you talked with there at the gate? A. At the time?

Q. Have you learned it at all? A. Well, you mentioned Mr. McDonald.

Q. Yes. A. Yes.

Q. Mr. McDonald did not know until after he had already told you that he was sorry, the plane was full, he did not know anything about your having to make a speech, did he? A. Well, he told me the plane was full, and then I pleaded

with him. So the answer to your question is: he knew right after the first communication to me that the plane was full, [59] sir.

Q. Then the answer is that at the time he first denied you boarding, he did not know about it, did he? A. Correct.

Q. Did you mention the particular speech you were going to make or the organization? A. I think I said something to the extent of I have to make an important speech at a rally in downotwn Hartford.

Q. You did not mention the Connecticut Citizen Action Group to him, did you? A. No.

Q. You have no reason to know that Allegheny Airlines ever heard of the Connecticut Citizen Action Group until this event, do you? A. I would suspect they have heard about it, because it had been very widely in the news for the prior year through the Connecticut newspapers, radio, TV.

Q. You do not know it, do you; you do not know that to be a fact: that Allegheny ever heard of it? A. No, I do not know it for a fact.

Q. You decided eventually not to take this—try to make the connection by way of Philadelphia, and you flew instead to Boston? A. That is correct.

Q. And the ticket to Boston cost you about $3 more than [60] the ticket to Hartford would have cost you? A. Yes.

Q. Mr. Nader, are you familiar with the fact that businessmen sometimes make reservations on more than one flight in order to be sure that there will be a flight when their conference ends or whatnot; are you aware of that? A. No.

Q. You have never heard of any individual booking flights on more than one flight? A. I have heard of students, for example, doing that.

Q. You know that happens, do you not? A. I know it has happened.

Q. And you know that is what is called a no-show, when they fill only one of those reservations, do you not? A. Yes.

Q. You know that has been a problem for the airline industry for a long time, has it not? A. I know they think it has been a problem.

Q. You do not think no-shows and cancellations are a problem for the airline industry? A. No, because I know that they can have appropriate remedies; and, indeed, one airlines has already developed an appropriate remedy to make it not a problem.

Q. What airline is that? A. Eastern.

[61] The Court: What do they do, just for my information?

The Witness: They have a leisure class where, in effect, they fill a plane, and the next person that calls is asked if he or she wants to be in leisure class, and that means that they go out to the airport, and if they do not get a seat, then they are put on the next flight, as I understand it.

It is a little better than a stand-by status, Your Honor.

The Court: But the flight that they fail to show up for leaves with a vacant seat?

The Witness: No, because the minute the plane is filled, the next person calling Eastern Airlines is told that the plane is full, but he can be put on what they call leisure status, which is a little better status than stand-by.

The Court: I see.

By Mr. Roberson:

Q. Mr. Nader, is one of the groups that you organized called Aviation Consumer Action Project? A. Yes, I helped organize it. Yes, sir.

Q. And you have your counsel, Mr. Reuben Robertson here. He is the director and the secretary of that organization, is he not? A. I believe so, yes.

Q. Are you aware that, when Eastern Airlines was attempting to experiment with this leisure class or conditional [62] reservation, which you have indicated to His Honor would be a solution to no-shows, that the Aviation Consumer Action Project filed a complaint with the CAB, the Civil Aeronautics Board, on May 21, 1971, saying that this experiment would constitute a fraud on the consumers, is

practically unworkable, and in most cases would be an empty reward and a deceptive device to victimize passengers; and that even though it might temporarily ameliorate the problems of no-show passengers at the expense of its competitors, the solution could not be achieved without committing fraud on many passengers?

Do you realize your group was doing that with respect to this experiment that you now mention to His Honor as being a solution to no-shows? Do you realize that? A. Yes. May I make the distinction that they are representing——

Q. I did not ask you for a distinction. I just asked you if you realize that they said that? A. If you want to be that precise, counsel, would you please read the question back, and then I will take the opportunity to answer.

Q. I think you answered it. A. Because I think you characterized it.

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[64] Q. Mr. Nader, when Mr. McDonald was talking to you about the possibility of making a connection via Philadelphia, he told you that if the connection were made, it would put you in Hartford about 55 minutes after your Flight 864 was scheduled to arrive, didn't he? A. I don't recall whether he was that precise, but——

Q. Well, you knew it would arrive about 12:10 or 12:15? A. Yes, around 12:15.

Q. And you knew that your own flight was to arrive there at 11:15, Flight 864? A. Yes, I knew that the flight from Philadelphia was scheduled to arrive at 12:15.

Q. And were you not interested in that when you first heard about it? A. I was interested in seeing when the new connection was supposed to arrive. I was no longer interested when I heard it was about 12:15.

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[65] Q. The Connecticut Citizen Action Group did not buy any ticket from Allegheny Airlines for you to come up there on, did [66] it? A. No, they did not.

Q. You bought your own ticket? A. That is right.

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[67] The Court: What evidence do you have, sir, that the action of the airline in refusing passage on the particular flight that you were not allowed to board was intentional?

The Witness: The evidence is an admission by the defendant that they have a systematic policy of overbooking, and that they do not inform the consumer of that policy of overbooking.

That they announce in their advertisements a clear implication that the airline company would honor reservations and take people to their desired destination on scheduled flights.

The Court: Anything else?

The Witness: And I think there is evidence in the deposition that was taken that there was an active attempt to conceal—not only a non-disclosure of this practice to the passenger or consumer, but an active attempt to conceal. This is indicated in their instructions to employees as to how to explain an overbooking.

The least that could be expected is for the passenger to be told that the flight is full.

The Court: Those three things, then, are the factual basis upon which you claim that there was an intentional act on [68] the part of the defendant airlines to refuse you passage on this flight?

Mr. Robertson: Your Honor——

The Court: Is that correct?

The Witness: I think there are three: the policy of overbooking, the non-disclosure of that fact, the active concealment of that, and the promotion in their advertisements indicating to the contrary.

Mr. Robertson: Your Honor, I assume that you are asking this witness' knowledge.

The Court: I am asking for this witness' knowledge, yes.

Mr. Robertson: There are other facts of record that are in the documentary evidence that substantiate this.

The Court: How do you know that there is a systematic policy of overbooking, Mr. Nader?

The Witness: I think that was admitted by Mr. Barnes, if I recollect correctly, in his deposition. He is president of Allegheny Airlines.

The Court: All right.

The Witness: And I think there is documentary material that counsel has that supports that, as well.

The Court: Now, do you have any advertisements here that imply that they will take people who reserve flights, regardless of whether the reservations exceed the number of seats? [69] Do you have any ads that say that?

The Witness: I don't have any ads with me, Your Honor.

The Court: Or do you have any ads that imply that?

Mr. Robertson: We do have an admission by the president, Your Honor.

The Court: Let me ask the witness, counsel. If you think I am being improper or unfair, you can object. Do you have any ads with you that imply——

The Witness: Not with me, Your Honor.

The Court: (Continuing) —that the airline will take people who make reservations, regardless of the number of seats available?

The Witness: I don't have any ads with me.

The Court: Have you ever seen any?

The Witness: Yes, I have.

Mr. Roberson: Excuse me, Your Honor. I don't think he has——

The Witness: Well, just let me——

Mr. Roberson: (Continuing) —and I would object to this, because I certainly do not think that any such ad exists, at least not by Allegheny.

The Witness: If you will just let me finish.

Mr. Roberson: I don't want any hearsay.

The Court: Your objection is noted. My function is [70] to find the fact, and if he has any evidence of it, I want to see it.

You say you have seen it, but you do not have it with you.

The Witness: What I am saying is my understanding, when these ads are put in newspapers with schedules——

The Court: Yes.

The Witness: (Continuing) —you know, that there are ten flights to Hartford a day——

The Court: Yes.

The Witness: (Continuing) —my understanding is that if you make a reservation and the company agrees to give you a seat, that you have a seat.

The Court: And you say that that implies that they will take people, regardless of the number of seats on the airlines? Is that your position?

The Witness: No, it is not. My position is it implies just the reverse. My implication is that if you reserve a seat, you will get one.

The Court: Regardless of the number of seats on the aircraft?

The Witness: That is my understanding. You see, my understanding from these ads is that they would not give you a seat if they do not have one available; that is, if their capacity was not enough for it.

[71] The Court: All right. Then you wish to change your testimony, I take it, to the effect that they would only give you a reservation if, at the time of handing you a reservation or agreeing to give you one, they had a seat available.

The Witness: Yes, that is right.

The Court: All right. So the ads do not imply that they would not give you a reservation unless, they, in fact, had a vacant seat and had not been oversold?

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Mr. Robertson: We have two double negatives there, Your Honor. I am trying to figure out—

The Court: You will have all the opportunity you want, sir, and I do not want the witness to feel, or you to feel, or Mr. Robertson to feel, the court is taking advantage of this or any other witness in this case or any other case.

But I think this witness would be the first to object, and he has the right to object, and I want him to know that he has the right on his own.

[72] The Witness: I want to be certain that I was not tripped up by a double negative.

The Court: Pardon me?

The Witness: I just hope I was not tripped up by a double negative.

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Redirect Examination

By Mr. Robertson:

Q. Mr. Nader, based on the promotion and advertisements that we have been talking about, is it your understanding that Allegheny, based on these ads, will not sell a confirmed reservation to a passenger unless it has the space to sell, in fact?

Mr. Roberson: Excuse me, Your Honor. I object to that because there aren't any such ads. I just do not think that he ought to say based on some ads when we do not have any ads in evidence.

We can't see what he is talking about, and, therefore, I think it is an objectionable question.

The Court: Well, I think it is an objectionable question, too, but, unfortunately, Mr. Roberson, I asked the question and opened the door.

Now, if there is any blame, it is going to be on the [73] court.

You may answer.

By Mr. Robertson:

Q. Is it your understanding that Allegheny is not going to sell you a confirmed reservation unless it really has the space to sell on the plane? A. Yes, that is my understanding.

Q. And that is based on the advertisements and the image that you have? A. As I understand their advertising and literature, the meaning of it.

Q. Mr. Nader, you testified before that the rally was scheduled for 12:00 o'clock? A. Yes.

Q. What was the basis of your knowledge of that? A. It was communicated to me that that was the time for starting the rally from Connecticut.

Q. And who told you that? A. It was communcated to me through Miss Colmore.

Q. And did you learn later that the time for the rally was changed to 12:15? A. Yes, after the incidents involving Allegheny's overbooking.

Q. You learned it after? A. Yes.

[74] Do you know why it was changed? A. Yes, it was changed in order to give the crowd time to leave their jobs in nearby offices and assemble in the Plaza and in order to have just a few minutes to meet with the staff at the Plaza of the Connecticut Citizen Action Group.

Q. Now, in cross-examination you testified that the crowd could not be expected to stay until 12:45 or 1:00 to await your arival. What is the basis for that testimony. A. That this was an audience that was assembling on their lunch hour, and that their lunch hour is between 12:00 and 1:00, and they have to get back to work.

You see, there are many office buildings sort of surrounding this plaza, and they have to get back to work at 1:00.

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[75] Q. Well, did you learn how close the connection had been in Philadlphia for those passengers? A. Yes, I think Mr. Koskinen indicated that it was a very close connection.

Q. In fact, two or three minutes' connection? A. Yes.

Q. Was this a legal connection that was offered to you in Philadelphia?

Mr. Roberson: If it please the Court, I object to that. I don't think it is material. He did not decline to go because he thought it was legal or illegal. He just thought it was too close.

The Court: Well—

Mr. Roberson: In trying to accommodate these people, they held up a flight.

The Court: I assume by "legal," he means was it scheduled to leave at the time stated. Is that what you mean, sir?

Mr. Robertson: Well, there are some connections that cannot properly be made, that cannot properly be booked, by [76] an airline because the connection is too tight. That is called an illegal connection.

The Court: Oh, well, then, I will allow it. The objection is overruled.

By Mr. Robertson:

Q. Do you know whether that was a legal connection that was offered to you or an illegal connection? A. No, the airlines consistently say there has to be 30 minutes between connections for them to schedule a second aircraft to take you to your further destination.

Q. Was this a legal connection that was offered to you, or was it not? A. No, is was not.

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[77] Q. Mr. Nader, you asked Mr. McDonald at the gate whether he could find out and make an announcement on the plane whether anyone would step down and volunteer to take a later flight so that you could make your important engagement.

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Q. Why did you do it this time? A. Because it was an extraordinary situation, to reach a gathering that could not be postponed.

Q. Did you explain that to the agent? A. Yes, I conveyed that meaning to the agent, and I think he understood it. He just felt that it was beyond his capability to do anything about it.

Q. Were you asking the agent to kick off anyone from the flight who had a confirmed reservation? A. No, I

was simply asking if anybody would volunteer to take a later flight.

Q. And what led you to believe that somebody might conceivably do this? A. Because I had been on airplanes where this had been [78] done. For example, a Congressman wanted to get on an airplane in order to meet a situation, or one person in a family of five, and the request is often made under such circumstances by the hostesses whether anybody would be on a sufficiently leisure schedule as to take a later plane.

Mr. Roberson: Your Honor, I object to this. It is hearsay. I don't know whether this has ever occurred or not.

By Mr. Robertson:

Q. Do you know whether it has ever occurred, personally?

Mr. Roberson: Well, it has not occurred, so far as I am concerned, on my airline, and I think it would be hearsay.

The Court: If he knows whether it has occurred on Allegheny, I will allow it. Otherwise, I will sustain the objection. Do you know whether it has ever been done on Allegheny.

The Witness: Yes, it has been done on Allegheny.

The Court: All right. And on this particular flight?

The Witness: No.

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[79] The Court: Now, gentlemen, I note the hour is 12:10. What can we accomplish before our luncheon recess? We are nearing our luncheon recess, but, of course, as I told you I believe on Friday, whenever it was that you were here last, I must finish this trial today.

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[82] Mr. Robertson: Well, we have tried to limit the case that we are going to put on in front of Your Honor. Most

of our case was documentary. We had to prove Mr. Nader's damages and the fact of the occurrence.

[83] We are not going to put on any other direct case, Your Honor.

The Court: This is your direct case except for—

Mr. Robertson: Except for Mr. Barnes and Mr. Moffett and the documentary evidence.

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[96] The Court: All right. Well, then, may I assume, Mr. Robertson, you would at this time move into the record the deposition of Mr. Barnes?

Mr. Robertson: The deposition of Leslie O. Barnes, yes, sir.

The Court: All right. That will be received, Madam [97] Clerk, as plaintiffs' exhibit what?

The Clerk: Plaintiffs' Exhibit 24.

The Court: All right.

(Plaintiffs' Exhibit No. 24 received in evidence.)

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[98] The Court: I promise you I will read the whole thing, every word of it.

[99] The Court: And I will do that. Now what else do you have to offer?

Mr. Robertson: Well, we have nothing further on our direct case.

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[108] The Court: Let us set a date for Mr. Moffett's testimony.

The Clerk: Monday, the 10th, at two o'clock.

The Court: All right.

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Jerome E. Huisentruit

was called as a witness, and, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Roberson:

Q. You are Mr. Jerome F. Huisentruit? A. Yes, sir.

Q. And what is your occupation? A. I am an attorney.

[109] Q. Are you employed by one employer, or do you practice generally? A. I am employed by one employer. I am assistant general counsel for the Air Transport Association of America, sir.

Q. And what is that? A. That is a trade association representing the certificated, scheduled U. S. airlines.

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Q. When did you graduate from law school? [110] A. In June of 1957.

Q. From what law school? A. Georgetown University.

Q. And what employment did you thereafter have? A. After I was admitted to the bar, later that year, I became employed with the Civil Aeronautics Board in February of 1958, and remained there until February of 1968, eleven years, sir.

Q. In connection with your duties with the Civil Aeronautics Board, did you become familiar with the jurisdiction of the board? A. Yes, I became thoroughly familiar with the jurisdiction of the board, having worked within the board in several divisions, including the Bureau of Air Operations, the Agreements Division thereof, dealing with Section 412 agreements, with control and interlocking relationships.

I then worked for over two years with the Bureau of Enforcement dealing with the jurisdiction of the board, or with the enforcement activities of the board, covering the various requirements that they enforce.

For the greater part of my time with the board, starting in 1963 through 1968, or February of 1968, I worked with the Bureau of Economics in the Rates Division.

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[114] Q. In connection with your work before the board, did you have anything to do with efforts to ameliorate the overbooking problems of the airlines and the no-show and cancellation problems that they were having? Did you have anything to do with that? A. Yes, I did.

Q. Has the board ever banned overbooking practices by the airlines? A. The board has not banned overbooking practices by the airlines. The board has, to the contrary, recognized the necessity for overbooking in the climate in which the airlines operate and has sought to ameliorate the harmful effects which may in certain instances result from overbooking. But overbooking, itself, has not been prohibited at any time by the board.

Q. How do you know this to be the fact? [115] A. Well, as I mentioned, I spent the greatest part of my time with the Rates Division of the Civil Aeronautics Board, and during my tenure there—I believe it was in 1965—the board proposed a rule-making proceeding relating to overbooking, which would—

The Court: When was that?

The Witness: In 1965, initially.

The Court: All right.

The Witness: I believe it was EDR 95. I am not certain of the number. I believe that was the number.

The Court: That is all right.

The Witness: And, as a member of the Rates Division legal staff, I worked on the proposal, as a rule-making proposal, with the formulation and the recommendation of that proposal to the board, which, if I may continue, would have—the basic provision of which would have required that in cases of overbooking the carriers notify all passengers on each flight 12 hours in advance that their particular flight has been overbooked.

This was issued as a notice of proposed rule-making, and, as a result thereof, the interested persons had an opportunity to file comments.

Comments came in from many parties, including the airline industry.

I was the person on the rates staff who analyzed those comments, re-evaluated them, and recommended a subsequent [116] rule-making proposal. I do not recall the number.

Q. You recommended it to who? A. Within the board, to the general counsel's office. We did the—the Rates Division legal staff did the work on that matter, since it involved an area within our primary expertise. That proposal was to susbtitute a new rule for the former one. This came out in January of 1957, and essentially that proposal would have recognized——

Q. 1957 or 1967? A. I am sorry. It was 1967.

Q. Yes. A. (Continuing previous answer)—would have recognized the overbooking necessity within the industry; would have not required the carriers to notify their passengers of an overbooking situation; but would have required that in the unfortunate event that overbookings actually resulted in oversales, that adequate compensation must be paid to those passengers who are denied boarding.

Q. Was it left at "adequate" or did they actually set up a schedule? A. Well, they set up a schedule which many thought was more than adequate, if you wish me to explain the schedule. It was roughly 200 per cent of the first remaining flight coupon, with a minimum of $50 and a maximum of $200.

[117] Now, this would not be in lieu of the ticket which was purchased. It would be a compensation. In other words, if you had purchased a $50 ticket and were denied boarding, your ticket would still remain good, but you would get 200 per cent of that ticket, or $100, as compensation for the inconvenience caused you in being denied boarding.

Q. Ultimately, was that cut down somewhat to what the board thought would be adequate compensation? A. Yes, it was. There were several problems presented to the board, principally with relation to the smaller carriers. It was felt that the minimum of $50 was too high, and the board cut that down to $25. Also, the maximum remained the same of $200, but the general compensation would have been 100 per cent, rather than 200 per cent of the flight coupon because of arguments that were made that beyond that would be a pure windfall and might lead to further abuses by passengers in the reservation process.

Q. And it is based on that experience, and knowing what the board did in that connection, that you say that they have never banned overbooking, but, in fact, have recognized it and provided, rather than banning it, that the carriers tender this denied-boarding compensation in the event of an oversale; is that the situation? A. That is absolutely the situation.

Q. Did they say anything in addition that the carriers would have to do with respect to deciding among several passengers? [118] Suppose three of them showed up who were oversold. Did they undertake to provide for which of the passengers should be boarded in the case where somebody should cancel out at the last second? A. They did not prescribe any method by which the carriers would have to choose between those who would be denied boarding. What the board did prescribe, in recognition of its obligation as a regulatory agency to prevent unjust discriminations, preferences, or prejudices, was to require that each carrier maintain a manual setting forth the manner in which it will exercise its denial of boarding to passengers.

The rules which it will exercise must be stated in the manual, and that manual must be filed with the Civil Aeronautics Board.

Q. So those priority rules differ between various carriers, do they? A. It was left to the individual carrier, and they do it differently between carriers. That is correct.

Q. Now, suppose that a carrier has a priority regulation which it promulgates. Does the court in a civil action have primary jurisdiction, or does the CAB, as to the reasonableness of that rule, as distinguished from whether or not it was violated? A. The question of reasonableness of that rule, as would be true of any tariff rule or rule relating or applicable to passengers and their transportation, would be a question under the primary jurisdiction of the Civil Aeronautics Board [119] or other utility that may regulate that mode of transportation.

Q. Now, then, the documents that would reflect the board's policy decision with respect to overbooking, would that be CAB economics regulation—let me show you.

Mr. Roberson: I need not even go through this formality, Your Honor, because there was no objection to these particular exhibits.

I want Defendant's D and E. These I wish to be offered in evidence and received in evidence at this time.

The Court: There being no objection, they will be received.

(Defendant's Exhibits D and E received in evidence, respectively.)

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[120] Mr. Robertson: Your Honor, the entire document will be in the record, am I correct?

The Court: Yes.

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[121] Mr. Roberson: The first extract from this document, dated January 10, 1967, is from this Notice of Proposed Rule-Making in which the CAB recites the problem and its tentative views.

From page 2 of that there is a recitation about the carriers' view that they should not be required, when they have an overbooking situation, to call up the passengers 12 hours in advance. I want to read that extract.

"The carriers unanimously oppose the rule proposed in EDR-95, particularly the provisions of the new Part 250

requiring a notice to passengers of an overbooked condition."

Going over to page 2, in the second paragraph:

"The oversales problem, therefore, is a severe one. It causes distress, inconvenience and damage to passengers. It impairs the public image of air carriers, casting doubt on the integrity of their reservations practices. Clearly, it is incumbent on the board and the carriers to do all within their powers to eliminate oversales [quote] to the extent feasible [close quote]."

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[122] Mr. Roberson: Obviously, it is for the purpose of illustrating what the witness has said: that they have not banned it. They have not banned oversales.

Now, on the next page, page 3:

"In light of carrier comment and other considerations, the board has tentatively determined not to finalize EDR-95. Rather, we propose to deal with the oversale problem by other means for the following reasons:

"1. The proposed notice requirement of EDR-95 would have necessitated substantial changes in the reservations practices and systems of carriers, and the board is not prepared to require such change in a system which has on balance worked reasonably well in the public interest.

"2. Various methods are available to the carriers to reduce the dimensions of the oversales problem by limiting or curtailing certain aspects of their reservations practices.

"3. Finally, the board believes the oversales problem can be substantially reduced by proposals herein to require carriers (a) to make prompt, effective, and adequate compensation to oversold passengers, (b) to establish priority rules for determining which passengers holding confirmed reserved space shall be denied boarding on oversold flights, and (c) to file reports of unaccommodated passengers."

The next thing I wish to read is from page 4, Your Honor.

[123] The Court: Let us assume that all of Exhibit D is in the record. Do you still insist on reading them all?

Mr. Roberson: I do not insist.

The Court: I will read them. I will read them, Mr. Roberson.

Mr. Roberson: Very well, sir.

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[124] Cross-Examination

By Mr. Robertson:

Q. Where did you attend law school, sir? A. Georgetown Law School.

Q. And what was your area of specialization? A. I specialized in administrative law in obtaining my Master's Degree in 1960, but in my undergraduate work I took the general curriculum. Most of my courses were prescribed, rather than electives.

Q. What was your employment after law school? A. My sole employment after law school—in the legal field, I assume you are asking me, because I was working between [125] the period that I got my law degree and when I passed the bar in a non-legal position.

But my sole employment in the field of law was with the Civil Aeronautics Board, starting in February of 1958, until February of 1968, as I mentioned, and then I was employed by the Air Transport Association since that time to the present.

Q. Have you ever worked for an airline? A. I have not worked for an airline at any time.

The Court: You mean directly?

Mr. Robertson: Yes.

The Witness: That is correct.

By Mr. Robertson:

Q. Now, have you written any scholarly articles? A. I don't know whether I would call them "scholarly". I have written many memoranda while I was with the Civil Aeronautics Board on regulatory problems within the agency and within the jurisdiction of the agency which——

Q. They were not published? A. (Continuing)——have not been published. No, they have not been published. I have also written about six or eight papers which were as part of my Master's Degree at Georgetown University, and which were not published, but were part of the degree requirements.

Q. Have you made any study of the actual overbooking practices of United Airlines?

[126] A. I have not.

Q. Have you made any study of the actual practices of American in this regard?

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A. Not that airline, nor any other airline, I might add.

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Q. Well, do you know specifically what the overbooking practices of these airlines are? A. I know that the practice which I became familiar with in my regulatory position with the Civil Aeronautics Board, as represented to us at that time, was that an analysis is made of a market, that is, Points A and B, by each carrier. Based upon the no-show and the late-cancellation experience in that particular market, a statistical analysis is made that there will be "X" empty seats on the airplane, even if they book it 100 per cent.

Q. Well, now—— A. On that basis the carriers book "X" number of seats more than they have in inventory to compensate for the number of [127] no-shows and the late cancellations.

Q. And you did that work and you learned that when? A. This was in 1965—during the period of 1965 through 1967, during the rule-making proceeding.

Q. All right. So we are talking about—— A. I did not get into the statistical exercise, mind you. I am just speaking of the theory or the practice that was represented to the board as having been done by the airlines.

Q. Six or eight years ago? A. That is correct.

Q. But you do not know what the practices are today, do you? A. Not personally. On hearsay, I do.

The Court: Do you have any evidence that they have changed from when he testified?

Mr. Robertson: Yes, Your Honor.

The Court: You do?

Mr. Robertson: Yes.

The Court: Are you going to present that?

Mr. Robertson: Yes, Your Honor.

The Court: All right.

By Mr. Robertson:

Q. Were you an expert on these practices or their economic necessity? A. I would consider myself an expert in that area to [128] the extent that any experts exist, at least as the situation existed in the middle 1960's and beyond.

Q. You are an expert on the economic aspects and the practical aspects? A. Yes, I think so.

Q. What is that expertise based on? A. My expertise is based on the fact that I worked in the area of rate-making and was familiar with the economic condition of the carriers individually and as an industry.

I also worked in that rate area on tariff rules. I was familiar with the problems with respect to no-shows. I was familiar in my regulatory capacity with the attempts of the carriers to have no-show penalties.

I was counsel in a case involving the Puerto Rico market where an effort was made to alleviate the no-show problem by forfeiture of the ticket, for example. This is a case of record, I don't have the citations.

Q. Well, I understand that you were an attorney in these cases, but does that make you an economic expert? A. To the extent that there are economic experts, I would hold myself out as one.

Q. Have you ever qualified as an expert witness on these matters? A. Today is the first time I have testified in any

proceeding with respect to this matter, although I have served as [129] adviser to the board, and I would hope that they would value by judgment as an expert during my tenure with the board.

Q. Did you know approximately how many people were actually denied boarding on domestic U. S. flights in 1970? A. In 1970?

Q. Yes. A. In 1970 I did not keep up with the statistical changes in the overbooking problems since I left the board.

Q. Is your answer no, that you do not know? A. I do not know.

Q. Do you know how many people were denied boarding on U. S. domestic flights in 1971? A. I saw the statistics. I don't recall them. I believe that the *Aviation Daily* publishes them every so often. I don't recall what they are.

Q. Do you know what they are so far as 1972 is concerned, sir? A. I can tell you what the industry averages per 10,000. I can't give you the total picture, no.

Q. You can't give me the total? A. No.

Q. Well, is it accurate if I said that almost a quarter of a million people were denied boarding on flights for which they held confirmed reservations during these three years?

Mr. Roberson: May it please the court——

[130] The Witness: I have no way of knowing.

Mr. Roberson: May it please the court, I would object to that. That is the very point.

This is a CAB problem. It is not something that he testified about on direct examination. His testimony was that the CAB has made a policy decision not to ban overbooking. That is all he has testified about.

Now, I don't think that, therefore, becomes material, as to whether 10,000 or 1000.

The Court: The objection is overruled. I think it comes within the scope of the direct.

By Mr. Robertson:

Q. Are you familiar with the CAB actions recently in the area of denied-boarding compensation and oversales? A. What period are you speaking of?

Q. Well, say, in the last three years. A. I am not deeply familiar with those actions. I have not continued my——

Q. So if the CAB has changed the rules since you were there seven or eight years ago, they might have done that for all you know, right? A. I believe they have made some changes, but I am not an expert as to what changes were made after I left the board.

Q. You are not an expert as to what has happened in the six or eight years—in the six years since you have left the [131] board? A. That is correct.

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[134] Q. To whom do you report at the ATA, that is, the Air Transport Association? A. Right. Principally to Mr. James Landry, who is general counsel of ATA.

Q. And to whom does he report? A. He reports to either the president of ATA, Mr. Paul Ignatius, or to the chairman of the board, Mr. Tipton.

Q. And to whom is the staff ultimately responsible? [135] A. The staff ultimately is responsible to the board of directors of the Air Transport Association, which consists of the presidents of the airlines.

Q. Who is Leslie Barnes? A. Mr. Barnes is president of Allegheny Airlines.

Q. And is he a member of the ATA board? A. I believe he is. I am not certain.

Q. Is he active on any of the committees of the ATA? A. I have never met the man. I am not familiar with him personally at all, except that he is the president of Allegheny Airlines.

Q. How are the ATA's expenses paid? A. By the membership on a dues formula.

Q. And does Allegheny pay part of that? A. Yes, indeed.

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Q. Do all the ATA members intentionally sell more reservations for their flights than they have seats available? A. At the present time?

Q. Yes. A. I do not know for certain. I believe they do. They represented to the board at the time I was there, and working on [136] the problem, that they did, yes.

Q. How is the public informed of this? A. Well, I assume, No. 1, that—well, I don't assume, I know.

No. 1, all the matters that were involved in rule-making becomes public documents and these are open to the public at large.

Q. Well, do you know whether the airlines tell the passengers specifically about this practice? A. The overbooking practice?

Q. Yes. A. Well, I would say, on the basis of their representations in 1965, they did not want to advise the passengers that they were overbooked, because this would needlessly alarm them, on which the CAB agreed with them.

I would say that they do not notify that they are overbooked, sir.

Q. Is the overbooking practice and the circumstances set forth in the airlines' tariffs? A. Certain aspects of —well I don't know them. If I would answer you correctly, I would say that—

The Court: Well, is it, or is it not, set forth in the tariffs, the overbooking practices?

The Witness: The oversale compensation is.

The Court: The overbooking compensation practices? [137] The Witness: Yes, the rules with respect to compensation are set out in the tariff, itself.

By Mr. Robertson:

Q. Well, the compensation is available in many circumstances where an oversale has not necessarily occurred—strike that.

Isn't it accurate that compensation applies to broader circumstances than just an intentional overbooking? A. It applies to all cases of denied boarding.

Q. Which may be because in certain cases of an equipment substitution? A. If I am not mistaken, I believe

that a substitution of equipment is an exception from the denied-boarding compensation rule.

Q. That exception is set forth in the rule? A. It is set forth in that rule, Part 250.

Q. Or an unintentional error that someone may have made in wrongfully or mistakenly confirming a reservation? A. For whatever reason the denied boarding may occur.

Q. Yes, sir. A. If it is not excepted in the rule, the tariff rule applies.

Q. But that would be one of the circumstances, right? A. Pardon?

Q. That would be one of the circumstances in which [138] denied-boarding compensation could be paid, pursuant to this tariff, right? A. That is correct.

Q. So the fact that a tariff exists that relates to a variety of circumstances under which you are going to get some compensation, that tariff does not tell the passenger that there is an intentional overbooking practice in the airlines, does it, sir? A. It does not.

Q. Okay.

The Court: Now, let me ask you a question:

You said a moment ago, at the time you were with the board, all of the members of the ATA who intentionally sold more tickets than they had seats did not inform the public. Wasn't that your testimony?

The Witness: That is correct.

The Court: Is that still true today?

The Witness: I don't know. I believe it is.

The Court: All right.

The Witness: This was the proposal, Your Honor, in EDR-95, to require them to inform the public.

The Court: You believe this is true today.

The Witness: I believe it is true today.

The Court: Could I rely on that as a fact?

The Witness: I think you can, Your Honor.

[139] The Court: All right.

By Mr. Robertson:

Q. You are an expert on the existing tariffs, right? A. On tariffs which are filed today?

Q. Yes. Yes. A. I am an expert on the law of tariffs and on the particular tariffs as they existed when I was with the board, but in my duties within the Air Transport Association I have not worked with individual carrier tariffs.

Q. Well, let me ask you about an industry-wide tariff. A. Okay.

Q. What is CAB Tariff 142? A. That sounds like a rules tariff. Isn't that the passenger rules tariff?

Q. That is my understanding. A. Yes.

Q. Are you familiar with Rule 66 in that tariff? A. Not by number. If you give me something other than the number, I may be.

Q. Well, have you ever heard of a conditional reservation? A. Yes, indeed, I have.

Q. Well, when was this put into effect? A. This is a proposal of Eastern Airlines. I believe the year was—it was within the last two years, was it not?

[140] Was it approved by the CAB? A. Yes, it was.

Q. And what was the basis of the CAB's approval of this tariff. A. I don't know.

Q. Are all tariffs approved by the CAB A. Well, the use of the word—I have to give a little narrative explanation.

Q. Fine. Go ahead. A. We use the word "approved" rather loosely. What actually happens is that the carriers are required to file a tariff thirty days, at a minimum, in advance of the proposed effective date.

If the board does nothing to that tariff during that 30-day waiting period, it goes into effect.

Now, then, we call that: the board has approved it. Actually, in certain cases it may not even have looked at it or have analyzed it at all.

The Court: In those situations it would be where there was no objection?

The Witness: Absolutely. If there is an objection, the board must look at a tariff.

The Court: But, generally, if a tariff does not go into effect without objection during the 30-day period after it is filed, it would be because somebody objected and, thereby, called [141] the board's attention to it; isn't that the way it works?

The Witness: It works that way most times, Your Honor, but the board's staff in the Rates Division, at least while I was there, did a fairly careful job of screening tariffs on their own motion and bringing problems to the attention of the board, even though there were no public complaints.

The Court: I see. All right.

By Mr. Robertson:

Q. But you do not know whether they are still doing that or not? A. (No response)

Q. Do you know? A. Well, since the same ultimate supervisor works there who did when I was there, I would say they do on that basis. Because that was his idea of public service.

Q. But, in reality, an airline could file any sort of proposed rule in its tariffs, and, unless it was challenged either by the staff or by another party, it would go into effect, is that right? A. If nobody challenged it, it would go into effect. That is correct.

Q. Yes. A. By "nobody." I mean including the board.

Q. Now, this conditional reservation that was introduced by Eastern Airlines, what did this provide for? [142] A. I can tell you in general terms.

Q. Well, tell me as much as you know about it. A. As much as I know about it.

Q. Yes. A. And I must say that I got most of this from newspaper readings and trade press readings myself, since I am not personally familiar with, and haven't worked with, individual carrier tariffs.

Mr. Roberson: Just a minute. Your Honor, I object this. I think we are going further afield. The inquiry in this case is not whether there is some other supplementary way to attack or ameliorate the no-show problem.

The question is whether or not the board has banned it, and the board has not banned it.

So the fact that they let Eastern Airlines experiment for a short time on some kind of conditional reservation would have no probative value in this case.

The court, in other words, with all due deference, the court would not sit here and say, well, although the CAB says that you can have overbooking, this court decides that, because you can have some conditional reservation system which would have some effect on no-shows, therefore, anybody that doesn't have the conditional reservation system is violating the law, and I am going to award a lot of damages because this airline or that airline has not done it.

[143] That is the very point of primary jurisdiction. And the fact that there are other approaches or supplemental approaches, which is what conditional reservation was, is therefore, irrelevant in this case.

Because here the evidence is undisputed that the CAB has not banned overbooking, the airlines' overbooking practices.

They, instead, opted for requiring the airlines to tender deferred-boarding compensation to any oversold passenger. They have not said, "You must never oversell."

They have said, "If you do, you must tender them this denied-boarding compensation, and you must advise them of their rights at the time about denied-boarding compensation, and you must file a list of your oversales every month with the board."

But they have not said, "You can't do any overselling." And, therefore, I think we are chasing down a side track when we are looking into whether or not there are some other things that would help with respect to the oversale problem.

The Court: What do you say to that?

Mr. Robertson: Well, Your Honor, we are investigating what the CAB has done, I think, precisely, and that is what I am trying to ask this witness.

Furthermore, as I understand the contention of the defendant Allegheny, it is that they concede that the CAB has [144] urged the carriers to do everything feasible, everything in their power, to eliminate overbooking.

I think that is in the opinion that has been introduced into the record here, and I think that is just what I am trying to explore with this witness.

The Court: How long will this take?

Mr. Robertson: Another five minutes on this, Your Honor. This is a very important point, though, what options are available and what options are now available to the carrier and whether this is really an economic necessity or whether it is something less desirable.

The Court: All right. Well, I am inclined to agree with Mr. Roberson, but I will try to keep an open mind and give it such weight as the court feels it is entitled to receive, in view of the issues in the case and in view of the fact that the court is sitting without a jury.

Mr. Robertson: Well, I understand, Your Honor, that the defendant is arguing that this practice of selling more seats than they have available on a flight is an economic necessity, and I intend to show that it is not.

The Court: All right. You may proceed.

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[145] By Mr. Robertson:

Q. It is a fact, is it not, that least three other carriers besides Eastern have now instituted the conditional reservation tariff? A. I do not know.

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Q. Do you know, or are you aware of the fact that the conditional reservation has now been extended for an additional two years until 1975? A. I do not.

Q. You did not know that? A. No.

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[150] By Mr. Robertson:

Q. In what respect is overselling flights an economic necessity for an airline? A. May I have the question read back?

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The Witness: Well, overselling flights is not an economic necessity. You used the word "overselling" and not "overbooking". I assume you are using that distinction intentionally.

By Mr. Robertson:

[151] Q. I am not aware of a distinction. A. Well, an overbooking relates to the practice in the reservation system of placing—of accepting more reservations than you have seats in inventory.

But if the system works at all, there are very few, if any, oversales.

Now, your question related to oversales and not to overbooking.

The reason there are no oversales, as distinguished from overbooking, is because the overbooking process takes into consideration the fact, No. 1, that, unfortunately, many members of the public make multiple reservations, having the intention of using only one of several reservations, and not bothering to cancel the others.

No. 2, some cancellations come at the last hour, and no more requests for reservations or few would come during that period. But if you had turned away previous requests, you would have no manner of retrieving them.

So, ideally, overbooking should result in very few. In relation to the universe that you are working with, very few oversales.

And your question was related to oversales.

Oversales, itself, is not an economic necessity. Oversales is an economic detriment. It is unfortunate when it happens,

and I am sure the carriers feel that way, too. Because the [152] carriers are penalized, and penalized severely, for that oversale to the tune of 100 per cent of the face amount of the ticket, in addition the value of the ticket.

If the carriers intentionally engage in overselling, they would go bankrupt very shortly by the simple laws of economics, sir.

Q. So, in other words, the amount of overbooking that occurs is much greater than the amount of oversales that result? A. My goodness, yes.

Q. So that in a given period of time, if they oversell a quarter of a million people, in that same given period of time they might have overbooked four or five times as many, is that right? A. Yes. And that is the whole justification for overbooking, because you—

The Court: What is the difference again between an "oversale" and an "overbooking"?

The Witness: Your Honor, overbooking is a statistical exercise in which you accept reservations. Let us say you have 100 seats. Now, you may realize on the basis of your past experience that in this particular market, if you have 100 reservations, only 70 of those passengers will show up. I am giving you a typical example.

The Court: Yes.

The Witness: Well, in that case you would overbook [153] that flight by perhaps 25 seats to take into account the fact that 30 of those reservations are bad reservations from the public's point of view. They are not going to show up for the flight, and they are not going to bother to cancel the flight, or cancel the reservation.

The reason you do that, No. 1, is economically for yourself; but, more importantly, from the board's standpoint, when I was there at least, we took into consideration the fact you are accommodating these 25 people, to whom, if you did not overbook, you would just say, "No, I am sorry. We are full. You cannot make a reservation."

They would sit home, and your plane would take off with 25 or 30 empty seats.

That is really, from the Civil Aeronautics standpoint, one of the primary justification for overbooking. It is an accommodation of the public because of the careless habits of other members of the public in holding seats which they will not use.

But the oversale occurs in that unfortunate case where either your statistical analysis is in error, but even by the law of average sometimes things are a little higher and sometimes things are lower.

There may be one or two passengers for particular flights in rare instances who exceed the capacity of the airplane, and that is when you have an oversale: when you must deny a [154] passenger with a confirmed reservation a seat on the aircraft.

The Court: If I have learned anything from this case, I have learned that if you have to be at a meeting or have to be at any one point or place in the country or the world, where the airline is under the jurisdiction of the CAB, you had better jolly well take a week in advance to get there, to make sure you are going to make it.

The Witness: I am sorry, but I can't agree with you, Your Honor.

The Court: The remedy, it seems to me, if it is overbooked or oversold, is set forth in the tariff, according to your testimony.

The Witness: Yes, sir.

The Court: And that may be a wholly inadequate remedy.

The Witness: Well, the fact is that such a small percentage—

The Court: That does not go to the problem of the importance of an individual being a certain place in point of time.

Suppose I have to give a speech, as I do, in Ohio at the end of this week and I do not get there because of overbooking. The fact that the tariff provides me with a remedy

of $25 plus 100 per cent of the face value of the ticket, or whatever it is, is not going to compensate me for my lack of presence [155] at this meeting, or a number of others that I have to go to next month.

The Witness: But if that particular carrier had not engaged in overbooking, they may not have given you a reservation in the first place. You might have stayed at home, Your Honor.

The Court: That is not in accord with what the Civil Aeronautics Board approves as a matter of policy. They can still overbook.

My ticket, which I have for all three of these trips, still may not be worth a darn when I get to the airport and present them.

The Witness: I would suggest, Your Honor, that if you are there within a reasonable time before flight departure, you would be accommodated.

In most cases the way—

The Court: Well, the implication is left from the testimony that I have heard today that if you get there a half hour before flight time—that is what the airlines normally tell you, is it not?

The Witness: Well, we would like you to get there half an hour before flight time.

The Court: Okay. That is what they tell us, as I recall it.

Mr. Robertson: There is no requirement in Allegheny's [156] case for that.

The Court: All right, but generally speaking, they do tell you that.

Mr. Robertson: Just arrive there before the flight leaves.

The Witness: Particularly because you have to go through certain security checks now with respect to luggage, et cetera.

The Court: All right. But that does not mean that my ticket is going to be honored, or that my reservation is going to be honored at all, does it?

The Witness: Well, statistically it means that it will 99.999999—I don't know how far you want to run it out—per cent of the time.

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The Court: I hope so.

By Mr. Robertson:

Q. Is every airline free to file its own tariffs concerning its reservations practices within the parameters set by this denied-boarding rule? A. Yes.

[157] Q. These are not fixed by the CAB? A. That is correct.

Q. And, in fact, when the CAB passed this rule that you have been testifying about, didn't they say that they were going to decline to exercise jurisdiction to govern the reservations practices? A. I don't think they said it quite that explicitly.

Q. But that is what they were doing, isn't it? A. They said they wished to permit each carrier maximum flexibility in setting forth its own priority rules, but I think the board made very clear in that rule that it was going to keep on top of these rules, because it is responsible for unjust discrimination, preference, and prejudice, and within its regulatory function it would be governing the rules in that manner.

Q. Wasn't the upshot of what the board said, though, that it was going to take a hands-off position so far as governing the reservations practices was concerned? A. Not in that broad language. I could not accept that, because the board said it is going to stand over these things and exercise its regulatory functions, if there were any cases of abuse, discrimination, preference, prejudice. That is the whole purpose in requiring them to be filed.

Q. Did the board's opinion direct itself to preempting the jurisdiction of other bodies, such as the courts, to deal with these problems of discrimination? [158] A. The fact that the board regulated in that area, I would say yes.

Q. And has any court held to the contrary? A. The contrary to what?

Q. To your testimony.

The Court: That the board has the sole and exclusive jurisdiction to regulate disputes such as the one we have here.

The Witness: I don't know of any court having held to the contrary. I would be most surprised, in view of the law of primary jurisdiction, if any had.

By Mr. Robertson:

Q. Well, you are an expert on the jurisdiction of the CAB in this issue? A. Yes.

Q. Are you familiar with the Archibald case, Archibald v. Pan American World Airways? A. No, I am not familiar with that particular case.

Q. Since 1971, have the air carriers conducted any meetings among themselves on a periodic basis to deal with this group of problems? A. Not to my knowledge.

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[159] By Mr. Robertson:

Q. Did the CAB in its order, or in its regulations that are now in effect, or have ever been in effect, seek to bar means of judicial redress for denied boarding?

Mr. Roberson: Your Honor, those speak for themselves. They are in evidence, Exhibits D and E.

The Court: Overruled.

The Witness: I think what the board did, in its initial regulation, at least, is set out a means of compensation which the carrier would be required to tender to the passenger as liquidated damages, and which the passenger was free to accept or not.

By Mr. Robertson:

Q. That is right. And didn't the board expressly provide that the remedy is not non-exclusive, and the passenger has option of undertaking litigation to achieve redress?

A. Well, with respect to the question of damages, compensatory damages—

Q. Answer the question I asked, please. A. I can't answer your question that broadly. Assuming that you are attacking the reasonableness of the program, I would have to disagree with you.

What the board did in its penalty provisions or compensation provisions is state:

This should more than adequately cover the damages to an [160] individual for his inconvenience in being oversold. You must, Airline, offer this to the oversold passenger, so that he does not have to bother with litigation.

The individual passenger is free, if he wishes, if his compensatory damages exceed the damages stated in the tariff, to seek his damages by litigation. But that does not encompass the attack on the reasonableness of the board's rule, itself, that is, on the question of—

Q. That is another question, but my question does not reach that. My question is simply:

Does the board's regulation say that passengers are excluded from going to court if they are denied boarding? A. I think I answered that: No, not on the question of damages.

Q. In fact, it contemplates that the passenger has an option? A. To accept the money, or if he thinks his damages were greater than that—

Q. That is right, or to—

The Court: Let the witness finish his answer, Mr. Robertson.

Mr. Robertson: Oh, certainly, Your Honor. I am sorry.

The Witness: If he thinks his damages were greater than that, he can go to court.

[161] By Mr. Robertson:

Q. If the passenger thinks his damages are greater than that provided in the tariff, he can go to court, is that right, sir? A. If his actual damages are greater than the

board has prescribed, he can go to court. That is correct.

The Court: This court, is that correct?

The Witness: Yes, that is my view.

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The Witness: Your Honor, I want my last answer to be clear. He can go to court on a question of damages. I did not mean that he could go to court challenging the reasonableness of what the CAB has done.

The Court: Right.

By Mr. Robertson:

Q. When an airline bumps a passenger because of an oversale, does not the CAB provide that he has 90 days to claim denied-boarding compensation?

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[162] The Witness: I don't know what the rule is today. I recall that the carrier must that very day that the passenger is denied boarding offer him the compensation.

At the time I worked with the rule, the passenger had 30 days in which to accept that voucher and endorse it. That is the time period that I am familiar with. I don't think your question addressed that. I am not familiar with your question.

By Mr. Robertson:

Q. My question did not address whether he has 30 days or 60 days to cash the check. My question is:

Has not the CAB said that the passenger has 90 days in case he is not given the denied-boarding compensation, or whatever he is entitled to after being bumped off a flight, 90 days to make a claim? A. I don't think the CAB—the carriers may have filed something in their tariffs with respect to the time limitation rules, but I am not familiar with that.

Ordinarily, the time limit for an individual bringing an action against an airline for a loss or damage claim is

specific in the carrier's tariffs. So I am not familiar with that provision.

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[165] By Mr. Robertson:

Q. Are you familiar with something known as the *Consumer's Guide* that has been put out by the Civil Aeronautics Board? A. I am aware that such a guide has been put out, and this purports to be a reproduction of that guide.

Q. Very well. Would you turn to page 2, please? A. Yes, sir.

Q. Do you see an item with Caption No. 2? A. Yes.

Q. Would you read the caption there? A. "Denied Boarding Compensation."

Q. And would you read the—in the center of the column, the third paragraph from the bottom under that caption? A. The part that you have marked in blue?

Q. Yes, sir. A. The whole paragraph?

Q. Yes, sir. A. "CAB regulations state that the airline must pay you the money for denied-boarding compensation within 24 hours. If you have not received the payment within that period of time [within the 24-hour period], you have 90 days to file a claim. The airline is required to keep ticket records only three months, and if you delay, you may not get the money due you."

Q. Does that refresh your recollection about what amount [166] of time is provided for making a claim after denied boarding? A. No, it does not.

Mr. Roberson: Your Honor—

The Court: He has already answered.

Mr. Roberson: We tendered him the denied-boarding compensation, so there was no question of the 90 days.

Mr. Robertson: I have no more questions.

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[167] (Defendant's Exhibits A, B, C, F, G, and H received in evidence, respectively.)

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[168] The Court: Do you want this list and the description as part of the record?

Mr. Roberson: I have just submitted that pursuant to Your Honor's pre-trial rule. I don't know what Your Honor wanted with that, but Your Honor specified——

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The Court: All right. It will be received as part of the record in evidence in this case, along with the exhibits, [169] themselves.

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The Court: And so will the plaintiffs' list.

Mr. Robertson: Yes. Your Honor, it is understood, I assume, that the characterizations as to what the evidence shows are purely that of counsel. Those are the contentions made by the parties.

The Court: Obviously.

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[170] Mr. Roberson: Your Honor, Exhibit C is two pages from the Allegheny *Passenger Service Manual.* They are needed in connection with the testimony of the next witness.

The Court: All right.

Mr. Roberson: The first one, Exhibit C, tells what an oversale is. It says: "An oversale is a passenger who holds a confirmed ticket for a flight and who checks in for the flight (this means appearing at our local ticket lift point before the scheduled departure time), but who cannot be accommodated on that flight because of insufficient seats, or seats being blocked. Give every oversold passenger Form SS-112."

On the next page I call Your Honor's attention to paragraph 5, where it says—this is in the procedure for what you do when you have an oversale, priorities—it says:

"If the oversale is not known until the flight is being boarded (this applies particularly where gate check-in is used), the last passenger to arrive at the gate is the oversale and is not permitted to board. Selection is automatic. Do not delay the flight seeking a passenger who would be least inconvenienced."

Those two things have to do with Mr. John McDonald. Would you call him in, please. He is the customer representative who talked with Mr. Nader at the gate.

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[171] **John McDonald**

was called as a witness, and, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Roberson:

Q. Your name is John McDonald? A. That is correct, sir.

Q. And what is your residence address, sir? A. 8 South Ingram Street, Alexandria, Virginia.

Q. What is your occupation, Mr. McDonald? A. I am a passenger service representative for Allegheny Airlines.

Q. At what airport? A. At Washington National Airport.

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[172] Q. What are the duties of a passenger service representative, just briefly, with Allegheny? A. I would be supervising the ticket counter and gate operations and giving information to all the passengers that travel with us, helping with children, and so forth.

Q. Were you on duty at Washington National Airport on the 28th of April, 1972, when Flight 864 was supposed to depart? A. Yes, I was, sir.

Q. What time was it scheduled to depart? A. 10:15 a.m.

Q. And what time were passengers allowed to start boarding on that flight? A. Approximately 10:05 that morning.

Q. How many passengers were boarded on it? A. 100.

Q. About how long did it take to board that 100 passengers? A. Five to ten minutes.

Q. What time had your gate area opened down there where people could begin checking in, as distinguished from actually getting on the plane? A. Approximately 9:30 a.m.

Q. What did you say the flight capacity was of this particular airplane? A. 100.

[173] Q. And by what time had you fully filled up that plane? A. Approximately 10:15—I am sorry, 10:10.

Q. Did anything out of the ordinary occur immediately thereafter, after the flight was fully boarded? A. Yes. We had passengers with confirmed tickets at the boarding area after we boarded 100 people.

Q. All right. Then, after you boarded 100 people, did anyone else show up? A. Yes, sir.

Q. Did you, afterwards, learn the name of the passenger that first showed up, after you had boarded 100 people? A. I believe it was a Mr. Koskinen.

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Q. Was there also another young man that arrived at or about the time of Mr. Koskinen that had to be denied boarding, also? A. Yes, there was.

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[174] Q. You did fill out a passenger denied-boarding slip with respect to the passengers that were denied boarding, did you not? A. Yes, I did.

Q. And that would give his name? A. Yes, it would.

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Q. What are you required to do when you have an oversale, that is, when somebody shows up after the flight is

already fully boarded with confirmed passengers? A. My primary objective would be to advise the passenger of the situation and find another means of transportation to get him up there as soon as possible.

Q. Do you have to make out any report forms for your [175] organization? A. Yes, there is a standardized form used when a passenger is denied boarding.

Q. Did you start filling out those forms for Mr. Koskinen and the other man? A. Immediately.

Q. Did you complete those before a third person came up? A. I completed the first, and I was half way through the second form.

Q. And what occurred then? A. Then Mr. Nader came up, running down the hallway.

Q. You say he was running. Do you know that he was running, or was he walking? A. Yes, he was running.

Q. Did you see him, or how do you know that? A. I caught a glimpse of him coming down the hallway through one of our windows.

Q. What time was it when he arrived at the ticket lift position? A. At least 10:15.

Q. Is that where you were working? A. I was there at that time, yes, sir.

Q. At what desk were you working in connection with filling out these denied-boarding reports? A. There were two check-in positions available at the [176] gate, and as soon as the denied boarding occurred, I moved over to the right-hand side in order to let the agent complete her writing, her paper work.

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Q. Did you do anything in connection with Mr. Pulzun and Mr. Koskinen with respect to seeing whether the people who had been boarded were properly boarded, or whether you could take somebody off, and they would go? A. I looked through the tickets, and I made sure that there wasn't any stand-by or white-listed passengers boarded.

The Court: That is, who had previously been boarded prior to the time you were looking?

The Witness: Correct, sir.

The Court: And was that situation prior to 10:10 on this particular day in question?

The Witness: Approximately 10:10.

The Court: All right.

By Mr. Roberson:

Q. Then, when Mr. Nader came up, did he, too, have a confirmed ticket, an okayed ticket? A. Yes, he did.

[177] Q. What did you do with respect to Mr. Nader? A. I advised him of the situation: that he would be denied boarding.

Q. What is a tare and balance sheet, a weight and tare sheet? A. A weight and balance tare sheet is what we call it.

Q. All right. A. It is a standardized form used to show the weight of the passengers, fuel, cargo, and where it is all located on board the aircraft.

Q. Does it have anything to do with the safety of the aircraft? A. Yes, it does.

Q. What is the connection? A. To make sure that the flight is not overweight or unbalanced.

Q. When is it sent out to the plane? A. Just before departure time.

Q. Had you sent that out by the time Mr. Nader arrived? A. Yes, that was already on its way out to the airplane, sir.

Q. And did you offer these gentlemen alternate transportation? A. Yes, I did.

Q. What did you propose in that connection? [178] A. We had a flight going from Washington to Philadelphia in the next 15 minutes, and I could offer a connection in Philadelphia arriving in Hartford, Connecticut, fifty-five minutes after the scheduled arrival time.

Q. Did you offer that to these three men? A. Yes, I did.

Q. Did any of them accept it? A. At first all three accepted.

Q. And then what happened? A. Mr. Nader made a few telephone calls and came back and said he would accept that. I advised him to meet me at Gate 16, where the rest of the paper work could be finished, and he did come down, after making a telephone call. He came to Gate 16.

I advised him he would have to take a bus out to the airplane.

Q. And then what did Mr. Nader say to that? A. He asked me what type of aircraft it was.

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Q. And what did you tell him? A. I advised him it was a Beech 80.

Q. And what is a Beech 80 plane? A. It is a commuter aircraft, twin-engine turboprop.

[179] Q. It carrier how many passengers? A. Fifteen people.

Q. What, if anything, did Mr. Nader say or do when you told him that this commuter aircraft was a Beech 80? A. He said, "Cancel it."

Q. And—— A. At that time he started down the hallway.

Q. Did you tender Mr. Nader this form that the airlines are supposed to tender about the rights to denied-boarding compensation in the event of an oversale? A. Yes, sir, I did.

Q. Tell us about that. A. I gave him the form, as soon as he got to the gate, and I advised him of the denied boarding. He said, "That is all right. I already have one."

I still said, "You have to accept mine. You do not have to read it, but you have to take it."

Q. Did he tell you from what airline he had already had one of those denied-boarding compensation rights cards? A. Yes, he said American Airlines.

Q. Did he take the one from you? A. Yes, he did.

Q. What did he do with it? A. He put it in his pocket, his coat pocket.

[180] Now, did Mr. Nader question you about whether or not the commuter flight would be able to make the connection to Philadelphia and get him to Hartford 55 minutes after the original flight, or did he cancel it after you made the statement about the commuter aircraft? A. So far as I remember, all he did say was, "Cancel it."

Q. Before that, had you already explained about the schedule in Philadelphia, the connection schedule? A. Yes, I did.

The Court: Well, the implication of your testimony up to this point is that, until the last question, when Mr. Nader was asked to meet you at Gate 16, he, in effect accepted your proposition or offer to fly to Philadelphia and thence to Hartford.

The Witness: That is correct, sir.

The Court: And he offered no objection to flying to Philadelphia via this Beech 80 aircraft.

The Witness: I am sorry. Would you repeat that?

The Court: And he offered no objection to flying via the Beech 80 aircraft.

The Witness: That is when he objected.

The Court: When?

The Witness: When he found out it would be a Beech 80.

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[181] What time was this connecting flight scheduled to arrive in Hartford, Connecticut? A. I think it was 12:10.

Q. Did Mr. Nader ask you, in substance, after you had told him the plane was full, did he ask you to see if anybody would volunteer to get off the plane and give up their seat for him? A. Yes, he did.

Q. Did you agree to do that? A. No, I didn't.

Q. Why not? A. The flight was already boarded and ready to go, and [182] the selection is automatic once we have 100 people on board.

Q. You are referring now to your *Passenger Service Manual,* Mr. McDonald? A. Yes, sir.

Q. And that says that the last person to arrive is the oversale? A. Yes, sir.

Q. Are you permitted under that policy to delay the flight, trying to find out who would be least convenienced or inconvenienced? A. No, I am not permitted to do that.

Q. Did you say anything to Mr. Nader about—after he had decided not to make the flight, about being able to pick up the deferred-boarding compensation at the ticket counter, if he wanted it? A. Yes, I did, sir.

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Cross-Examination

By Mr. Robertson:

Q. Mr. McDonald, what time, according to your testimony, did the two other denied-boarding passengers arrive at the gate, Mr. Koskinen and Mr. Pulzun? A. Approximately 10:10.

Q. Not 10:12? [183] A. Approximately somewhere in that area?

Q. 10:10? A. 10:10, 10:12.

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[184] Q. Is it true that your recollection was that the two passengers arrived at about 10:05 or 10:10, when the gate agent, the other agent at the gate, advised you that there were two extra passengers? A. I am not sure of the exact time, but that did happen.

Q. So you are not sure of the exact time? A. Not to the second, no.

Q. Or to the five minutes? A. I could not be perfectly sure, no.

Q. Actually, Mr. Koskinen did arrive at the gate about 10:05, didn't he? A. Approximately.

Q. And Mr. Pulzun actually arrived at that gate about 45 minutes to an hour ahead of time, didn't he? A. That is possible.

Q. In fact, wasn't Pulzun one of the first ten or 11 people who checked in? A. I don't know.

Q. Well, wasn't Pulzun actually allowed on the aircraft and then put back off? [185] A. No, sir.

Q. You did not go out to the plane and make him get off? A. I did not.

Q. And you do not know if anyone did? A. Nobody did.

Q. Are you aware that the company has gotten a statement from Mr. Pulzun giving this account? A. No, I am not.

Q. If he gave such a statement, would that be false? A. I would believe it to be false.

Mr. Roberson: May it please the court, I don't think he ought to characterize what some other witness has given in some self-serving statement.

The Court: Well, ask him whether it was the truth or not.

By Mr. Robertson:

Q. Was it the truth? A. To my knowledge, it was not.

Q. Are you still sure that Pulzun and Koskinen, as you just testified, arrived about 10:10 to 10:12? A. At the check-in position, yes.

Q. I thought you said that Pulzun may have arrived, it was possible that he arrived, 45 minutes early? A. That is possible.

Q. What time did Mr. Nader arrive? [186] A. Approximately 10:15.

Q. You seem very exact about that? A. Yes, sir.

Q. How can you recall that so precisely? A. Because it was right at the departure time. I try to be aware of the time

Q. What was the scheduled departure time? A. 10:15.

Q. What time did the flight actually depart? A. Approximately 10:25.

Q. 10:25? A. That is correct.

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[188] Q. Well, this document shows that the plane departed on schedule at 10:15, is that correct?

Mr. Roberson: Well, I don't think he ought to paraphrase the interrogatory answer. I don't remember what it was,

what they did say. But if he is going to quote from it, I think he ought to quote the answer to the interrogatory. It may have said that. I don't know.

Mr. Robertson: Your Honor, I read Question No. 25(g), requesting, with respect to Allegheny Flight 864, on April 28, 1972, from Washington to Hartford, "the time at which Flight 864 departed from the gate at Washington National Airport."

The answer, as given: "Flight 864 reported 10:15 a.m. departure."

Mr. Roberson: Well, that is not the same thing as he was trying to paraphrase, Your Honor. They may have been two minutes off in that, but they reported as 10:15 departure. Now, whether that is a fact or not, as to actual departure, that may have been different.

But he was trying to paraphrase it.

The Court: Well, I will read the interrogatory, and the answer, and consider it in the light of all of the other evidence.

By Mr. Robertson:

[189] Q. Mr. McDonald, isn't it possible, based on that record, that your watch might have been in error? A. I don't believe so.

Q. You do not believe it is possible? A. That is correct.

Q. Has it ever been wrong? A. Of course, it has.

Q. Why would it be impossible for it to have been off at this point? A. Because I had just checked it with our operations office approximately 15 minutes before that.

Q. Well, since your recollection is not exact about the time that Mr. Koskinen and Mr. Pulzun might have arrived, and since your recollection disagrees with company records as to the time the plane left by five or ten minutes, might you not also be mistaken about the time that Mr. Nader got to the gate? A. I don't believe so.

Q. You do not believe it is possible? A. No, sir.

Q. Actually, if he had arrived at ten-fifteen-and-a-half or after the scheduled departure of the plane, he would not have been an oversale, would he? A. Technically, not.

Q. He would not have been eligible for denied-boarding compensation in that case, would he? [190] A. I think—I am sure I still would have taken him as a denied-boarding passenger.

Q. Well, under Allegheny's tariffs and rules you cannot just give away the company's money to someone who is not eligible for it, can you? A. I held this belief because I am sure something would have come out of it.

Q. What do you mean, something would have come out of it? A. Just being 15 seconds late or 30 seconds late, one way or the other.

Q. All you do if he is late is tell him, "I am sorry. You are late. The flight is closed." A. I could have said that, yes, sir.

Q. And you would have, if it had been after the departure time of the flight? A. Not necessarily.

Q. Did you have a discussion with Mr. Nader about whether there were any stand-by's on board? A. Yes, he asked me if any stand-by's had been boarded.

Q. What did you tell him? A. No, sir.

Q. Did you make a check? A. Yes, I did.

Q. Did you have a discussion with him about making an announcement on the flight to see whether anybody might volunteer [191] to take a later flight, so that the crowd would not be disappointed? A. He asked me if I would make a speech so he could get on the flight.

Q. He asked you if you would make an announcement? A. That is correct.

Q. What did you say? A. I said no.

Q. You were aware that there was some urgency in his being on that flight at this point? A. Not really, sir.

Q. You were not aware that there was any urgency? A. No, sir, not at that point.

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Q. Do you recall having your deposition taken and giving testimony under oath on July 6, 1973, in this matter? [192] A. Yes, I do.

Q. And do you recall the following question:

"Did you understand from him that there was some urgency about getting there?"

And do you recall giving the following answer:

"I did. I did." A. That was after he asked me to see if somebody else would get off the airplane.

Q. Isn't it true that Mr. Nader got to the gate in more than ample time to make the flight, and if the flight had not been overbooked, he would have been put on it? A. No, sir.

Q. It is not true? A. It is not true.

Q. And your testimony is that the flight did not leave until 10:25? A. Exactly.

Q. That gave him ten minutes? A. I am saying if the flight were leaving as scheduled he would not have gotten on.

Q. I am asking you: Isin't it true that if he had gotten there that day, based upon when he did get there that day, if the flight had not been overbooked, he would have been accommodated? A. It is possible.

Q. It is true, isn't it? [193] A. It could have gone either way depending on how fast the computer was sending out the weight and balance tare sheet.

Q. Why did you refuse to check whether any passengers might help out the situation, considering the circumstances, the fact that the problem had been induced by overbooking? A. By my *Passenger Service Manual,* or Allegheny's manual, it is automatic. I am not to delay the flight any further, looking for somebody who may possibly be lesser inconvenienced.

Q. Well, how long would it have taken? A. Not very long.

Q. Not more than 30 or 40 seconds, would it? A. I am not sure.

Q. Well, you are pretty sure, are you not? A. Considering the airplane was about 100 yards away from the gate where I was.

Q. Well, would it have taken you 20 seconds or 30 seconds to walk to the airplane? A. I would say for the total time

of going out and making an announcement it would be one minute.

Q. One minute, now? A. Right.

Q. All right. A. And also coming back into the lounge.

Q. I am referring again to your deposition, on page 64. Do you recall being asked the question: "And how long would it [194] have taken to do this," referring to making the announcement and asking for a volunteer, and your answer: "I am not sure. It would all depend on how easy or how hard it would be for somebody to get up.

"Queston: Well, for example, would it have taken you 30 seconds to walk to the plane?

"Answer: Approximately.

"Question: And another 20 seconds to make the announcement?

"Answer: Not even that, 10 seconds."

Do you recall that testimony? A. Yes, I do.

Mr. Roberson: May it please the court, he ought to finish reading from that, because he stops——

The Court: Read the full question and the full answer, and then ask him if those questions were asked and those answers given.

Mr. Robertson: Well, Your Honor, the rest of it relates to an objection that was raised by Mr. Roberson.

Mr. Roberson: No, it does not.

You asked a question. I made an objection. Then the witness made an answer, and I think it is all pertinent to this about how long it would take to——

Mr. Robertson: Very well, Your Honor.

The Court: I just got done reading it, but the witness has not heard it, so you had better ask him.

[195] Mr. Robertson: The question that I put to the witness originally had to do with how long it would take to make an annoucement.

The next question that we get into is, if someone accepted, it might take another three or four minutes to get them off the plane.

An objection was interposed by Mr. Roberson. "How about getting their baggage out of the hold?

And I respond, "That is true."

And the answer of the witness: "That would be impossible. I would not even try it. There are 200 pieces of luggage in there."

By Mr. Robertson:

Q. Do you recall that testimony? A. Yes, I do.

Q. So your prior testimony was that it might take you 30 seconds to make the entire trip out to the plane and make the announcement, is that right? A. And another 30 seconds or so to get back inside the lounge?

Q. Yes. A. Right.

Q. Another 30 seconds? A. Right.

Q. So you are counting roundtrip, sir? [196] A. Correct.

Q. Now, it would not be necessary to take the baggage off of the plane if someone wanted to volunteer, would it? A. By company manual, it would. We are not allowed to separate a passenger from his baggage.

Q. Well, suppose someone has checked in for a flight and, as the result of an oversale, it develops that they are overbooked and don't board it, and their baggage has already been put on the plane. The baggage is going to go, is it not, Mr. McDonald? A. We will ask the passenger whether he wants his baggage back or not.

Q. But you know it frequently goes ahead to the destination, does it not? A. Most likely because we can get the passenger there very quickly.

Q. So, all that would have been required was to tell whoever might volunteer that, "Your baggage will be waiting for you in Hartford when you get there"? A. Yes.

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[197] Mr. Robertson: I am through with that line, Your Honor.

The Court: All right.

The Court: All right. I will overrule the objection and give it such weight as the court feels it is entitled to.

By Mr. Robertson:

Q. Now, what is a "PNL" or a passenger name list? A. A "PNL" is a passenger name list.

Q. Well, what is that? A. It is a computerized listing of the names of the passengers holding confirmed space on a flight.

Q. This is used as a check-in tool, is it not? A. Not necessarily.

Q. It is not used as a check-in tool? A. It does not have to be.

Q. But it is used as a check-in tool? A. It is at times used as a check-in tool.

Q. For the gate, right? A. Correct?

Q. But usually it is not used, is that correct? A. It depends on the time of day and which flight and how many agents are involved in boarding a flight.

[198] Q. So it is a tool that is often overlooked if there is a press of passengers? A. It is not overlooked. The PNL will be there. It may not be used to mark off every passenger's name as he checks in right then and there, but they will have to use that eventually, sir.

Q. And this list of confirmed reservations is accurate up to the time it is printed out and taken up to the gate, is that right? A. That is correct.

Q. Now, the PNL was not used to check in Flight 864, was it? A. It was there.

Q. It was there, but it was not referred to or used as a check-in tool, was it? A. I don't remember.

Q. You do not remember? A. Correct.

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Q. Now, if over 100 persons were holding reservations for Flight 864, this would show up on the PNL, would it not? A. Yes, sir.

[199] Q. What is a "PBI"? Do you know what that is?

A. Yes, sir. It is a Passenger Boarding Information read-out or print-out from a computer.

Q. And what does this information provide? A. It will give the information of all the passengers holding space on the flight that have not been ticketed, plus passengers that need assistance, plus the in-bound connections from both Allegheny and other airlines.

Q. Well, it does give you that total number of passengers who were booked out of your station, does it not? A. Yes, it would.

Q. It also gives the status of the space out of each station; in other words, if a flight is overbooked out of a particular airport, it would show "OB," would it not? A. Yes, it would.

Q. So doesn't this provide you with a tool to find out in advance whether a flight is overbooked or not? A. Yes, it does.

Q. And isn't this information made available to Allegheny at the gates? A. It has to be picked up by the agent who is working the flight, or that agent will ask for somebody to get one. It is not a required piece of material used for each flight.

Q. But it is available, is it not? A. It is available.

[200] Q. And there are other tools available of the same nature, such as the PMB, right A. That is correct.

Q. Therefore, isn't it true that if a flight is heavily overbooked, the information is in the computer and it is available to the agents at the gate? A. What do you mean by "heavily overbooked"?

Q. Well, if a flight will hold 100 passengers and there are 107 or 108 booked with confirmed reservations on the flight, this information is in the computer, and it is available to the agents at the gate, is that right? A. That is right.

Q. Are they not supposed to know in advance the status of the flight? A. Not necessarily. If an agent works 15 or 20 flights a day, it is hard to keep up with each flight.

Q. So, as a matter of course, sometimes it is just not done? A. Which one are you speaking about now?

The Court: What is not done?

By Mr. Robertson:

Q. That the agents sometimes do not ascertain what the status of the flight is, in advance of the flight? A. They will usually know how many people are booked, but there are a number of ways of doing it.

[201] Q. Now, how was 864 actually checked in and boarded on this date? A. In what way, sir.

Q. Well, what happened when a passenger presented himself to board the flight? A. At 9:30, the agent made a check-in announcement and started taking tickets and stamping boarding envelopes for all the passengers.

Q. All right. A. That started about 9:30.

Q. And where were the passengers told to go? A. To have a seat inside the lounge or in the Gate 17 area.

Q. And the stand-by's were put in the same area? A. That is correct.

Q. Then the door was opened to the airplane and everyone was sent out at once at that time to board? A. All but the stand-by's.

Q. How were they segregated? A. They were advised at the boarding announcement to remain seated until their names were called.

Q. So if more than 100——

The Court: Pardon me, sir. May I interrupt?

Mr. Robertson: Of course, Your Honor.

The Court: I may have missed something that is very [202] significant today.

I understood you to say earlier, sir, that all the people that were on board the ship, Flight 864, by the time Mr. Koskinen and Mr. Pulzun and Mr. Nader arrived, had confirmed reservations.

The Witness: That is correct.

The Court: Well, now, from the answer to the question he just asked, I gather that that may not have been true, and that some of these people were stand-by's that got on this plane.

The Witness: No. When we check in the passengers, the stand-by passengers, we hold on to their tickets at the check-in desk.

The Court: Certainly.

The Witness: And, as the passengers are going out the door, all the boarding envelopes are checked.

The Court: you mean, once a stand-by gets on, he becomes a confirmed reservation, the same as somebody who called up six weeks in advance?

The Witness: Not for this particular flight, no, sir.

The Court: Were there any stand-by's on this Flight 864?

The Witness: No, sir.

The Court: Okay.

Mr. Robertson: Your Honor, if I may refer you to one of plaintiffs' exhibits that has been admitted into evidence, [203] Plaintiffs' Exhibit No. 5—I refer specifically to the first paragraph—I think you will see a company record that demonstrates the true answer to your question about whether any stand-by's were boarded on the flight.

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Q. According to the company's records, there was at least one stand-by boarded on the flight?

Mr. Roberson: Well, then, I submit it is immaterial. It would take at least three to get to Mr. Nader. He was the third oversale, and if there were a stand-by on there that shouldn't have been on there, then Mr. Koskinen was entitled to it, or Mr. Pulzun. It was not Mr. Nader. They could not skip them, Your Honor.

So unless there were three on there, this is immaterial, and I don't think counsel is going to make any tender that there were three.

The Court: Well, you are a little bit late in objecting, Mr. Roberson.

Mr. Roberson: I make an objection to the relevancy. If there were a single stand-by, we are wasting time with this

witness, because it would take at least three for it to make any difference in the outcome of this law suit.

[204] The Court: All right. You ought to look at that exhibit, Mr. Roberson.

Mr. Roberson: I have looked at it, and I still say it does not make any difference.

The Court: All right. Next question.

By Mr. Robertson:

Q. Well, now, you could have lifted more than 100 tickets marked "Confirmed" at the time the flight was being checked in, is that right? A. That is possible.

Q. Yes. And in that case more than 100 people might then have walked out to the airplane when the gate was opened, right? A. That is possible.

Q. And in that case somebody would have had to be sent back, right. A. Yes, sir.

Q. The person sent back would be the guy, very likely, who the least effective in shouldering his way on to the aircraft, rather than the guy who was last in checking in for the flight, is that right? A. That would be possible. Also, at the same time, we try to keep a record of who was last to check in, in case that does happen.

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[206] Q. Now, was the reservations list or the PNL or any of these tools actually used to see if passengers really had reservations for the flight when they presented themselves? A. Yes, it was.

Q. It was? A. That is correct.

Q. And you ascertained, based on that, that all of these passengers had an actual reservation for the flight? A. All of these passengers had okayed tickets showing [207] that they were confirmed.

Q. Right. That is not my—— A. Except for one passenger who had an open ticket.

Q. And which passenger what that? A. I don't know. I am pretty sure it was a group of four, or a family, and

the agent working the flight checked with the PNL, and the name was there.

Q. My question was not whether you looked at the ticket to see if it were in an okayed status, but whether you actually referred to the reservations list or the weight list to see whether a person had a valid reservation? A. In this case she referred to the PNL, and the name was there.

Q. How do you know that? A. I asked her.

Q. When did you ask her? A. Not too long ago.

Q. So it was after your deposition was taken, is that correct? A. Right.

Q. Now, how are passengers supposed to be selected for denied boarding? A. At Washington the selection is automatic.

Q. At Washington the selection is automatic? A. Any area where there is gate check-in.

[208] Q. Well, the manual that I assume you are referring to really says that where the oversale is not known in advance, isn't that correct? A. That is correct.

Q. But here you knew in advance, or you could have known in advance? A. I didn't know in advance.

Q. And no one could have known in advance this flight was oversold? A. They could have, but nobody advised me of it.

Q. The company knew, didn't they? A. Not necessarily.

Q. Not necessarily? It was in their computer records, was it not? A. This is true.

Q. But you did not use the procedures that are applicable where the oversale is known is advance? A. It is physically impossible.

Q. You did not use them, did you? A. At that time?

Q. Right. A. I was very busy that morning.

Q. All right, but you did not use them, did you? A. I did not use the check-in tool?

Q. Excuse me. You did not use the procedures set forth [209] in the manual for cases where a flight is known to be oversold in advance? A. That is correct, because I did not know the flight was overbooked.

Q. But by checking with any of the status tools, with any of the check-in tools, you could have seen the flight was overbooked, couldn't you A. That is correct.

Q. Do you ever use these procedures for denying boarding and selecting passengers where the flight is known to be oversold in advance? A. Yes, I have.

Mr. Roberson: Now, just a minute. Your Honor, counsel is using "overbooked" and "oversale" as if they are the same thing, and I think that is confusing and tricks the witness. He could not know that there was an oversale until the 101st passenger showed up.

He could know it was overbooked, but he is slipping that "oversale" in when he should be saying "overbooked."

The Court: Well——

Mr. Roberson: I think it is important, Your Honor.

The Court: I think the witness is an expert witness in the nomenclature of the trade. I doubt if he has been tricked here.

Mr. Roberson: I think that Mr. Robertson knows the [210] difference between those, and I think he ought to be precise in his questions.

The Court: Well, I would agree. Counsel, if you can, limit your questions to one of the two subject matters, when you ask the witness a question.

By Mr. Robertson:

Q. How are you instructed to handle the oversold passengers? A. I don't understand your question.

Q. Well, what are your instructions for handling an oversold passenger? A. Via the manual

Q. Whatever instructions you have. A. First of all, to keep the passenger calm.

Q. To keep the passenger calm? A. Right. Very often passengers will get quite upset. And then to listen to the passenger, of course, if he has anything to say, and then advise him what I can do to get him to his destination as soon as possible.

Q. Are you instructed to advise him the reasons why he has been denied boarding? A. I am not sure if the manual states that or not.

Q. I would like to show you an exhibit, Mr. McDonald, Plaintiffs' Exhibit 6. That is the manual used by Allegheny's passenger service agents, including yourself? [211] A. That is correct.

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[212] Are you instructed to advise the passengers what happened and the reason for the oversale? A. I don't think so.

Q. All right. A. I could not give you verbatim on that. You have a copy of the manual there. That is a year old now, and it is changed quite often.

Q. Are you advised to tell the passenger that an intentional overbooking may have caused his oversale? A. I usually would advise the passenger that there has been a mistake; exactly what it is, I don't know, unless, of course, it is an equipment substitution, or something like that.

Q. You would not advise him that an intentional overbooking policy may have caused his distress? A. No, I don't think I would.

Q. And that is because you do not think it is good publicity for the company, do you? A. That is true.

The Court: Is that the reason you did not do it in this instance?

The Witness: I was not sure of the reason for it at that time.

[213] By Mr. Robertson:

Q. Well, you did mark on the forms and the report that you filed the reason for the oversale being overbooking, did you not? A. Yes, I did. That was the most obvious reason, but I still was not sure.

Q. Now, this is the last short series of questions. Concerning this trip to Philadelphia with the possible con-

nection to Hartford, was this a legal connection in Philadelphia? A. No. Company-wise, it was not a legal connection.

Q. It was an illegal connection, was it not? A. That is correct.

Q. Was there some risk that the connection might be missed? A. There would have been some risk.

Q. Did you guarantee that it would be made? A. No.

Q. Did you tell him it would be close? A. Yes, I did.

Q. And even if the connection had been made, the second flight was not scheduled to arrive at Bradley Field until almost an hour after the first flight, is that right? A. Approximately 55 minutes.

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[214] Q. All right. And you gave a report in writing about this denial of boarding to someone in the company? A. Just the required denied-boarding form.

Q. You did make a report? A. Yes, I did.

Q. Mr. Nader did not tell you at any time that the type of aircraft that was offered to him had anything to do with his decision, did he? A. No, he did not.

Q. And, in fact, you had informed him of these verious other features and problems with the alternative transportation—— A. I advised him I would have somebody meet him because it would be a close connection.

[215] Q. Was the flight actually held up in Philadelphia for the connecting passengers? A. It did not have to be.

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Redirect Examination

By Mr. Roberson:

Q. Does your company require you to board anyone that has an okayed ticket, everyone that has an okayed ticket for a flight? A. Yes; if the ticket is written correctly, regardless of any other information, the passenger is to be boarded.

Q. If it has an "okay" on the ticket, then you down there board him, is that correct? A. That is correct.

Q. And that was the situation on this flight: that you boarded the first 100? A. That is correct, sir.

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[216] Recross-Examination

By Mr. Robertson:

Q. Is this program of checking in anyone with a confirmed okay showing on their ticket, is this set forth in the tariffs? A. It is in the company policy manual, yes.

Q. Is it in the same section on denied-boarding priorities that we have been taking about? A. I am not sure. I don't think so.

Q. You don't think it is? A. It would be in a different section.

Q. All right. A. There is a general section for passenger check-in.

Q. But the section that is submitted to the CAB concerning denied-boarding procedures, this is not contained in that section? A. I don't know.

Q. Thank you.

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(Witness excused)

The Court: Now, we will return here when, Madam [217] Clerk?

The Clerk: September 10th.

The Court: And you will produce your other witness on that date?

Mr. Robertson: Yes, Your Honor.

Mr. Roberson: Your Honor, I have one witness here from Pittsburg, because I understood Your Honor wanted to finish the case today. So I brought him down from Pittsburg.

He will not take very long.

The Court: How long is not very long?

Mr. Roberson: Maybe counsel will stipulate that he will testify to what I have said at page 7 of my brief, which is only about ten lines. That is on page 7. The witness is John H. Jenkins.

The Court: Wait a minute.

Mr. Roberson: I don't think there is any dispute that that is—about any of that in there.

The Court: All right.

Mr. Roberson: Of course, if we can stipulate to that, it is quicker than having him in here.

The Court: Let me read it.

Have you got that, Mr. Robertson?

Mr. Robertson: Yes.

The Court: Will you stipulate, if he were called, he would so testify?

[218] Mr. Robertson: Yes, I would.

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The Court: All right. The court will be in recess, so far as this case is concerned, until Monday, September 10th, at 2:00 p.m., at which time the further witnesses for either side will be presented that either side wishes to testify.

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Excerpt From Transcript

September 10, 1973

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[8] **John Koskinen**

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Direct Examination

By Mr. Robertson:

Q. State your name and residence for the record, please. A. My name is John Koskinen. My residence is in the District of Columbia.

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[9] Q. In 1972, April, what was your employment? A. I was administrative assistant for Senator Ribicoff of Connecticut.

Q. And your duties in that job? A. As his administrative assistant, I was responsible for the operations of his staff, both in Washington and in Connecticut.

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Q. And on April 28, 1972, do you recall having a confirmed reservation for Allegheny Flight 864 to Hartford from Washington? A. Yes, I did.

Q. Were you ticketed in advance for this flight? A. Yes, I was.

Q. And what exactly happened when you arrived at the gate [10] to check in for this flight? What time was it, first of all? A. I arrived approximately eight to ten minutes in advance of the departure time at the gate with my ticket. There was no one standing in front of me that I can recall. I approached the agent, handed him my ticket. He stated that there was—there was a pause, and then he stated that they had a bit of a problem. He made a call on his receiver and told me—all of this took place in a matter of seconds—that there was not a seat on the plane.

When I asked him how that could be since I had a ticket, he said that they had overbooked.

At that point in time, as I was beginning to explain to him that I had a meeting for the Senator in Connecticut, a voice over my shoulder said, "You think you have a problem." I turned around, and Mr. Nader was right behind me.

Q. And you knew Mr. Nader personally? A. Yes, I had had some dealings with Mr. Nader through Senator Ribicoff.

Q. And how far behind you was he in arriving at the gate? A. In terms of time or distance?

Q. Yes, in terms of time. A. He would have arrived, my estimate would have been, within a minute or two after I had been there.

Q. Did you hear Mr. Nader ask the gate agent anything about who was on the plane? [11] A. The agent then, in response to Mr. Nader saying, "You think you have a problem," and then asking the agent what the problem was, gave him the same story: that they had overbooked the flight, and that he would not have seats on the plane. Mr. Nader then did ask if there were standby's on the plane.

I might note that when I arrived, the lobby area had been emptied, so that there were only, as I can recall, two other people——

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Q. There was some question about standby's on the flight? A. Yes, Mr. Nader did ask whether there were standby's on the plane.

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[12] Q. I would like to know whether you are aware whether Mr. Nader said anything about the urgency of his trip or his mission?

The Court: You may answer.

The Witness: Mr. Nader explained that he had a luncheon speaking engagement to a public gathering in downtown Hartford that it was important for him to make, and that was basically what he stated.

By Mr. Robertson:

Q. Were there any other oversold passengers, in addition to yourself and Mr. Nader, at that time? A. To my recollection, the only other ones that I knew of were the other two gentlemen who were in the waiting area when I arrived. One was a younger man, and the other was a serviceman.

Q. Did you learn when either had arrived at the gate? [13] A. I have no idea how long they had been there.

Q. But they were there in front of you? A. They were there, not even at the gate. They were in the waiting room.

Q. Was any offer made of alternative means of getting to Bradley? A. The agent explained to us that they would try to make alternative arrangements to get us to Hartford as quickly as they could, but they could not get us there within an hour—I think it is an hour—my recollection, anyway, is that he said they could not get us there within an hour of the scheduled arrival time. Therefore, we had the option of being awarded as damages the price of the ticket.

He explained with regard to the alternatives that it would involve a commuter flight from Washington to Philadelphia, and an attempt then to catch a scheduled flight from Philadelphia to Hartford.

Q. Did he say anything about the nature of this connection? A. He pointed out that they would have to rush to make the connection, because we would not have enough time to catch the commuter flight to Philadelphia in time to catch the flight to Hartford. So it was going to be a close question, but that one way or the other, at some point during the day, they would get us to Hartford.

[14] Q. Did he say whether the connection could be assured or not? A. He could not assure us that we would make this particular connection.

Q. Did Mr. Nader respond in any fashion to this suggestion? A. Mr. Nader explained that, not only did he have a scheduled luncheon address, but then he had other appointments later in the day that made it important for him to be able to not miss more than one appointment. He stated his concern was that, if he went to Philadelphia and the connection did not transpire, he not only would miss, or be late to, the downtown meeting in Connecticut, but would miss his later meetings during the day.

Q. You did take the connecting flight, did you not? A. Yes. I called my office and made other arrangements to be met in Hartford. I then took, with the other two gentlemen in the waiting room and other people already on the commuter flight, the commuter flight from Washington to Philadelphia. We were met in Philadelphia, as the plane landed, by an agent—it might have been two agents—from Allegheny, who took us immediately from the commuter flight into the terminal to one of the adjoining gates and put us on a plane that was waiting. It was already filled, and that was apparently the scheduled Allegheny flight from Philadelphia.

[15] We took that plane, and as soon as we got on, the plane took off, and we landed in Hartford.

Q. What did you do when you arrived at Bradley Airport? A. I was met by a gentleman from our Hartford office, who had been scheduled to meet me earlier in the day. I walked off the plane. I had no luggage. I was met by him in a car and driven to our office in downtown Hartford.

Q. What time did you arrive there? A. I arrived there at approximately one o'clock.

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[16] Cross-Examination

By Mr. Roberson:

Q. Mr. Koskinen, the ticket, the man at the ticket gate told you, did he not, that he thought he could get you on this Philadelphia connection that would put you in Hartford 55 minutes after your scheduled arrival, had you taken Flight 864? Didn't he tell you that? A. He did tell us that it was possible, but he did also point out that he was giving us—I don't mean to volunteer, but he was giving us—the option of cancelling the tickets, because they could not guarantee that they would get us there within an hour.

Q. The important thing to me is that he said it was scheduled to arrive, if everything worked out, 55 minutes after Flight 864, itself, was scheduled to arrive; isn't that right, sir? A. I have no specific recollection exactly what the minutes were. My recollection is he said there was a good possibility that we could make it, and that either

way they would get us to Hartford as quickly as they could.

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[17] A. 11:15 was the time.

Q. It is a one-hour flight from Washington to Hartford? A. That is what I meant to say. Having flown it a lot, I knew it was an hour, and not two hours.

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[19]

Anthony John Moffett

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Direct Examination

By Mr. Robertson:

Q. State your name and your residence for the record, please. A. My name is Anthony John Moffett. My residence is RD 2 in Unionville, Connecticut.

Q. Are you also known as Toby Moffett? A. I am.

Q. And your current employment? A. I am the director of the Connecticut Citizen Action Group in Hartford.

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[24] By Mr. Robertson:

Q. Now, does this background and experience give you a basis for evaluating the success or the viability of specific fund-raising strategies?

Mr. Roberson: I object to that. I think that is a matter of opinion.

The Court: I have to agree with that, Mr. Robertson. That objection will be sustained.

By Mr. Robertson:

Q. Now, the Connecticut Citizen Action Group, would you tell me when that was first started? A. Well, the initial fund-raising for that group took place in April of 1971 during Earth Week, as I recall. I was hired in late July, I believe, by Mr. Nader to go up to Connecticut

and start putting the group together after some money had been raised to start it, and put a staff together. It was to serve as a model for the rest of the nation.

Q. After you went up there, did you have responsibilities for fund-raising on a continuing basis? A. Well, yes, I certainly did. I must say that we wanted to create a record that would be worthwhile——

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[27] A. The specific plans that were made for the spring fund-raising——

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The Witness: (Continuing previous answer)—were a combination of events, speeches, in other words; canvassing, and that type of thing, as well as a direct-mail campaign and the sale of buttons and bumper stickers.

By Mr. Robertson:

Q. Did Mr. Nader agree to assist in this? A. Oh, yes.

Q. What, in particular, did he agree to do? A. He agreed to make a swing through Connecticut at least once and give speeches and urge people to raise money. He also agreed to send a letter out to people that we would locate who might be interested, and he would put his name on the letter that would go to them.

Q. Would you tell the court about the rally that was scheduled for April 28th in Hartford? A. The rally was something that was added on to an appearance that Mr. Nader was going to make at the University of [28] Connecticut in Storrs. We had planned on his going to Storrs and then launching fund-raising efforts in New Haven——

Q. Excuse me. That is S-t-o-r-r-s, is it not? A. Yes, that is the home of the University of Connecticut, sir.

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The Witness: And then also going to storefront operations that had been set up in New Haven and Norwalk to address much—well, much smaller crowds than those at the University of Connecticut.

But this is the way we were going to use Nader.

In addition, we were having him make radio tapes that could be used, as well, to try and raise some money.

By Mr. Robertson:

Q. And what about the rally in Hartford? A. Well, the rally was arranged after what we felt was an unjustified action by our Public Utilities Commission. We argue these things in a hearing room, and we have lawyers who go in and argue them. We do not argue them out in the streets, but we felt, and the City of Hartford also felt, that they had unjustly granted an interim rate hike without any public hearings.

So we scheduled the rally because we knew Mr. Nader would be in the area. We did not schedule it until we checked to see if he would be able to address the rally and make a pitch for [29] fund-raising, using that issue as a stepping-off point.

Q. Were any other speakers scheduled to appear at the rally? A. Well, this was the subject of a continuing discussion, and it finally ended up with the Mayor, Mayor Athanson, and City Council President Nicholas Carbone.

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The Court: All right. And did the Mayor and the President of the City Council speak?

The Witness: They spoke. Yes, they did.

The Court: How many people attended the rally?

The Witness: Well, the number of people who actually showed up on Constitution Plaza——

The Court: Yes.

The Witness: (Continuing)—by my estimate, were somewhat in excess of 1000.

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[30] The Court: And the size of the group that appeared there was not affected one way or the other by Mr. Nader's presence, or lack of presence?

The Witness: Very much so, Your Honor. It was affected by his lack of presence.

The Court: Let me ask you this question, sir:

How could it have been affected when they did not know that Mr. Nader was not going to be able to arrive?

The Witness: Well, when I said 1000, the 1000 people who showed up were there before we even were under way with the rally.

I stood up and announced that Mr. Nader was not going to be tehre, and the crowd evaporated, to a large extent. From that point on it was all downhill.

But I think the important thing to remember is this:

The purpose of the rally from our point of view was to raise some money. From the time Mr. Nader—we learned that he could not show up, this purpose was frustrated, because we did not go ahead with the fund-raising.

In other words, we did not have people selling buttons and bumper stickers. We did not have anyone making a pitch for money, because we felt people would have thought, after the big build-up, that we were asking them to come down [31] to this Plaza using Mr. Nader as a drawing card, and then not having him there, and then saying, "Hey, how about giving us some money for this rate case."

So we just decided not to do it, and the crowd was not there to do it with anyway, by the time the rally actually started.

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[32] Q. Let me ask you how you specifically knew what flight—whether you specifically knew what flight Mr. Nader was to arrive on. A. Oh, sure.

Q. And how did you know that? A. Well, I knew it because I, No. 1, had checked with the lady who does his travel, who does his arranging. Secondly, I called the airline, as I have done in several instances, by just calling and saying, "I would like to confirm that Mr. Nader has a reservation on this flight." I just do that to be sure he is booked on a particular flight.

Q. You called the airline and asked whether Mr. Nader had a confirmed reservation? A. That is right.

Q. What did they tell you, when you called? A. They said yes. I had done that before, and this time they said yes, as they always had.

Q. Did you rely on this knowledge that was conveyed to you in making the plans for the rally? A. Well, of course. He was the attraction, and we leafleted very, very heavily. That was the other thing that I may have failed to mention. We leafleted all the insurance [33] companies and other places where you would naturally draw people from for an event of this kind at noontime.

Q. Okay. Were you aware of, or did Allegheny inform you of, their intentional overbooking practice? A. No.

Q. Did you know that this particular flight had been overbooked? A. No.

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Q. But if you had known in advance, were there other things you could have done to save the rally? A. Other things that would have gotten Mr. Nader there?

Q. Yes. A. Yes.

Q. What, specifically? A. Well, the point is, I think, is that I felt there was nothing we could do to save the rally at that time. I assume that we could have gotten another flight, or attempted to get another flight.

[34] Q. An earlier flight? A. An earlier flight, yes.

Q. Or some other means of transportation? A. Yes. Yes.

Q. Would you have done things that way, had you known of the risk? A. Yes.

Q. And then you learned that Mr. Nader was not on the flight. By what means did you learn that? A. By telephone.

Q. And what did you do then? A. Well, I dispatched the person who was then my administrative aide to Boston. Immediately after finding out that he was not going to be on that flight, then a short time after that, a matter of

moments, finding out that he was going to be on a flight to Boston, we sent Mr. Chapman off to fetch him. Then, I began preparing very quickly some remarks to make before the rally was really under way.

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[42] Cross-Examination

By Mr. Roberson:

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[50] Q. When do you say you made the arrangements with Mr. Nader to speak at the rally in Hartford? A. The arrangements were made with Mr. Nader's representative sometime around the end of the week prior to the arrangements for the rally for his appearance at the rally, sometime around the end of the week prior to his appearance.

Q. The rally was scheduled for April 28th. Would "sometime around the end of the week" mean the previous Saturday? [51] A. I think it was probably Thursday or Friday. That is my recollection.

Q. Now, you remember having your deposition taken in this case in November of 1972, and being asked questions when you were under oath about this case? A. Oh, yes.

Mr. Roberson: Page 6, Your Honor.

The Court: All right.

By Mr. Roberson:

Q. "Question: Do you have any documentation that would make you positive as to when that was done?" This is talking about your call to Mr. Nader's representative. A. Yes.

Q. "Answer: No, I don't. I do know that it was late in the week, prior, probably a Saturday."

That question was asked you, and that is the way you answered it; isn't that so? A. Yes, I suppose.

Q. And when was it that you arranged with the Mayor and the City Council President to speak at this electric

utility protest rally? A. Again, I think it was right after I confirmed that Ralph would be able to do the rally that we began finalizing it with the Mayor, late in that week prior, around the 20th, the 21st.

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[52] Q. If Friday were the 28th and you first learned that Nader said he was going to be able to speak on the previous Saturday, it was after Saturday that you arranged with these people, was it, or had you taken it up with them beforehand? A. Oh, we had taken up with them beforehand the possibility of doing this, certainly.

Q. And you had flyers printed up and distributed by your people advertising this rally, didn't you? A. Yes.

Q. When did you have those mimeographed, or however you had them produced? A. As I recall, again, early in the week of the week that the rally took place.

Q. Was the rally scheduled for 12:15 to start? A. I think we originally talked about noon, and then we thought that maybe we had better give people a chance to get down from Hartford Fire and Aetna and places like that, which is quite a walk.

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[53] Q. Mr. Moffett, would you answer my question? I asked you if you transmitted to Mr. Nader the information that the rally was to start at 12:15. Now, is the answer to that, that you did transmit it, or you did not? A. The answer is I am not sure.

Q. I show you what has been introduced into evidence as Exhibits F and G. Are these copies of the two flyers that your group distributed during the week before the rally? A. Yes.

Q. Both of them call this a ratepayers' rally, do they not? A. Sure.

Q. They do not say it is a fund-raising rally, do they? A. No.

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[55] How long had you planned for this rally to last? A. Roughly, 50 minutes.

Q. And that would have taken it from 12:15, according [56] to those flyers, to five minutes after 1:00, wouldn't it? A. That is right.

Q. So if Mr. Nader had arrived at Hartford on a flight arriving there at 12:15, he would have gotten to Constitution Plaza before the rally was planned to break up, wouldn't he? A. No.

Q. Referring to page 37 of your deposition, did I ask you this question, and did you answer this way:

"Question: Had Mr. Nader arrived at Hartford by 12:15, at the airport, he could have gotten into the Constitution Plaza meeting before it broke up, couldn't he?

"Answer: Well, not much before it broke up. You see, we lost the crowd at that point."

Was that question asked you, and did you answer that way, sir? A. Yes.

Q. And although your rally had been planned to go to 1:05, in fact, it broke up about 12:45, isn't that right? A. That is right.

Q. Now, had you known that Mr. Nader was going to try to make a connecting flight, you could have put that rally in a holding pattern, and Mr. Nader could have spoken at the end of it, could he not? A. No.

Q. Who spoke first at the rally? [57] A. I did.

Q. And you spoke about five minutes? A. Roughly. Maybe a little more. Roughly five minutes.

Q. And when did the Mayor speak; was he next? A. Yes, he was.

Q. About how long did he talk? A. Oh, I don't know. I think he talked—it is hard to recall, but maybe 15 minutes.

Q. And about how long did Carbone talk? A. Carbone probably talked, oh, ten minutes or so.

Q. So you got your 30 minutes of speaking right here, isn't that right? A. Thirty?

Q. Yourself, five; Carbone, ten; and the Mayor, 15? A. Yes, sir.

Q. And had Mr. Nader arrived down at Constitution Plaza by 12:45, he would have had 20 minutes to talk, wouldn't he? A. Yes, to about 50 people.

Q. Do you think that, had you announced at the beginning of the program that Mr. Nader had been delayed and had to take a later flight but would be there before the rally was over, that everybody would have turned around and walked out anyhow? A. Most of these people, yes, I think they would have.

Q. What time was this speech scheduled over at Storrs, Connecticut, for that afternoon? [58] A. Two o'clock.

Q. And Mr. Nader didn't get to that rally until 2:30, did he? A. No.

Q. And that crowd waited for him, didn't it? A. Do you want a yes or no answer?

Q. Yes. A. Yes, they waited.

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Q. When you were making arrangements for Mr. Nader to come up for your rally, you did not ask him to arrive the day before, did you? A. No.

Q. You did not ask him to take an earlier flight that morning, did you? A. No.

Q. There were other flights that would put him in Hartford earlier that morning, were there not? A. I don't know.

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[59] Q. You say that you checked with Mr. Nader's Washington—one of his Washington representatives, as to what flight he was going to take? A. Yes, that is where I received the information that he would be on that flight.

Q. She is the one who elected that he take Flight 864, isn't she? A. I believe so.

Q. Did you protest that choice? A. No. No.

Q. And you checked back with her and found out that

she did get a confirmed reservation on that flight? A. Yes, I received confirmation on that from her.

Q. You know that Mr. Nader is a little bit sensitive about what he considers to be his right of privacy, don't you? A. Sensitive about what?

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[60] Q. You know, in fact, that Mr. Nader sued General Motors for a lot of money because he alleged that they had violated his right of privacy; don't you know about that? A. Oh, those kinds of violations I know about.

Q. Yes. And don't you think it unlikely, having known about those events, that Allegheny Airlines would tell Mr. Moffett, or anybody other than Mr. Nader, himself, whether he had a confirmed reservation on their airlines or not? Wouldn't that have been an invasion of his right of privacy, if they had given out that information to an outsider? A. I will tell you the truth: I didn't know that that was—it did not strike me at the time as a violation, and I have done it several times.

Q. My question is: Don't you think it unlikely that Allegheny Airlines, knowing how sensitive Mr. Nader is about [61] his private plans, how unlikely it is that they would have told Mr. Moffett that Mr. Nader was arriving or had a confirmed reservation on such-and-such a flight on such-and-such a date? Don't you think that unlikely? A. It is very difficult to answer your question because it happened. I can't tell you how unlikely it is, when it happened, and it has happened before.

Q. Well, it is what you are testifying has happened, but don't you think that Allegheny Airlines, a normally intelligent employee of Allegheny Airlines, would not hazard the risk of offending Mr. Nader about that? A. No, I don't necessarily conclude that.

Q. You have no way of knowing, do you, Mr. Moffett, as to how many of these people came to Constitution Plaza to show interest in opposing electric utility rate increases, as distinguished from those who were coming

to hear Mr. Nader? A. Only past experience in terms of the number of people that come out to see him.

Q. To be specific about this rally on that date, of the 1000 people who were there, you have no way of knowing, of that original 1000 people that you estimate showed up, how many of them were primarily interested in not having their own electric bills raised, or came for that purpose, as distinguished from hearing Mr. Nader make a speech? A. Well, sir, I don't know what would explain their [62] turning around and leaving, when they heard he was not going to be there, then.

Q. Well, 1000 of them did not leave, did they? A. Almost, by the time we were ten minutes into the rally.

Q. Isn't it a fact that only about one-third of them left? A. One-third of them left, I believe I said in my deposition, immediately.

Q. When you made your announcement? A. That is right.

Q. The rest of them could very well have left because they were getting bored with you and the politicians, isn't that right? A. Oh, precisely.

Q. Now, if you considered Mr. Nader such a hot property when it came to fund-raising, why didn't you reschedule his speech as soon as possible to repair any real or fancied damages that you had sustained by his failure to appear? A. There was no way that we could bring those three ingredients together again: the rate-case issue, and the potential givers, with the fact that he was going to be there. He was going to be speaking at Storrs anyway.

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[63] Redirect Examination

By Mr. Robertson:

Q. Why didn't you check on whether Mr. Nader would have been able to take a flight the night before or some other flight that morning? A. His coming in on this flight left at 10:15 served our purposes very well. He was com-

ing to meet with volunteers whom he was going to fire up and encourage, and then he was going to do the same thing with a large crowd, and there was plenty of time to do that.

Q. Well, did you think he was going to get on that flight, Mr. Moffett? A. Of course.

Q. Now, this group at the University of Connecticut, were there any differences between that audience and the audience you had in the Constitution Plaza rally? A. First of all, they had paid to get in. Most of them had bought tickets in advance.

Secondly, they were a young group. The campus atmosphere is quite a bit different than Constitution Plaza.

[64] Thirdly, they were not on lunch hour.

Q. Now, what is the regular lunch hour in Hartford? A. It is roughly 12:00 to 1:00 for insurance employees. That appears to be what it is.

Q. So by five of 1:00, people generally have to get back to their offices, do they not? A. Right.

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UNITED STATES DISTRICT COURT, DISTRICT OF COLUMBIA
[Title omitted in printing]

Deposition Of Leslie O. Barnes
[Plaintiffs' Exhibit 24]

Washington, D.C.
August 20, 1973

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Deposition of LESLIE O. BARNES, taken on behalf of the plaintiffs.

Examination By Counsel For Plaintiffs

By Mr. Robertson:

Q. For the record, would you state your name and your residence and address. A. Leslie Barnes, 4625 Holly Road, Rockville.

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[4] Q. And your title? A. President.
Q. Of? A. Allegheny Air Lines, Inc.

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Q. What are your duties, generally, as President of the company? A. I'm the Chief Executive Officer.

Q. And what does that entail in terms of the operation of the company? A. It represents the responsibilities normally associated with being the Chief Executive Officer of the company that's responsible for operations, finance, sales, corporate administration.

Q. And you're the major executive with responsibility in the area of the company's practices and policies; would that be accurate? A. That is correct.

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[7] Q. Does Allegheny offer reservations for all of its flights? A. Yes.

Q. Why does Allegheny offer reservations? A. The same reason that every other airlines offers reservations. There are a number of reasons for it. I don't know. It depends on the individual. It offers reservations so it can indicate or control the number of passengers that are on an airplane.

Q. Is this for the benefit of the company, principally? A. No. It's a benefit of both the company and its customers.

Q. What's the benefit to customers? A. It gives a, within the normal latitudes that exist, reasonable assurance of fulfilling one's plan, whether it be business or pleasure.

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[8] Q. When you say "Within the normal latitudes," what do you have in mind? A. Well, just a matter of percentage, I suppose, but there are a number of normal expectancies that a flight will operate as scheduled and as planned. And the passenger, in calling in and asking for reservations, if the seat is available at that time, he is confirmed.

Q. Is there any legal requirement to do this? Could you sell seats on a first-come-first-serve basis if you decided to do it that way? A. You could.

Q. Since when has Allegheny offered reservations? A. Ever since I've been with the company.

Q. And how does a passenger get a confirmed reservation for a particular flight? A. He or his agent or representative calls and ask for a seat.

Q. And then the Allegheny representative or agent will confirm it? A. Um hmm.

Q. Um humm.

And do they make a record of it at that time? A. There are records, as far as I know.

[9] Q. Are there any other requirements that a passenger has to fulfill prior to flight in order to get a seat? A. It varies, maybe to get his ticket to be at the airport within a reasonable time so he can be checked in, the baggage handled——

Q. Is there any requirement for reconfirmations, specifically? A. I don't know.

Q. Is there any requirement for purchasing the ticket 30 minutes in advance or more, generally speaking? A. It will vary, depending on the flight, depending on the other, but I'm not aware of what the differences are. Normally, it's well to have the ticket picked up before arriving at the airport.

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[10] Q. What is a confirmed reservation on Allegheny? A. When a passenger calls, if seats are available it's confirmed. I'm not aware as to whether we require that the ticket be picked up so far in advance, and the seat could be tentative, I suppose, as to that point. But I'm not familiar with those details.

Q. Aside from the procedures, what I'm trying to get is, what is the passenger entitled to expect when he gets a confirmed reservation? A. Well, he would expect, normally, to have a seat.

Q. And what does Allegheny want him to expect, just that? A. Of course.

Q. Well, does Allegheny consider to have a contractual or a moral obligation to give him a seat when he arrives? A. In the whole gamut of this area of reservations, the area of operations and the fulfillment of an operation area, there are a number of things that can cause a flight even not to operate or to even have less passengers than is indicated: Weather, it can be a change of equipment, whatever. So that within the framework that we operate, we do not have a contractual liability.

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[11] Q. Does Allegheny consider that it has a good faith, business obligation in those circumstances or a moral obligation? A. Yes, it does everything it can do to fulfill its obligations, real or implied.

Q. How do people find out about Allegheny's services and about the reservations that are available for its flights? A. Through advertising, through the numbers that are given and through the calls that they make.

Q. Excuse me. Through the numbers that are given? A. The number to call. Either in—every advertisement gives a number or go through your travel agency.

Q. So the company does want them to know about them? A. Of course.

[12] Q. In your advertising, do you try to convey an image of reliability and dependability? A. Certainly.

Q. Do Allegheny's tariffs set for the reservation services? A. The tariffs?

Q. Yes. A. Well, I don't know where it all is, where it's all set forth. But, certainly, the passengers through advertising, through publications of various kinds, do know what the number is to call, whether it's through the tariffs, or the schedules, or the telephone bill.

Q. Do you know what the tariffs might say about—— A. No, I do not.

Q. —who's entitled to a seat on a particular flight? A. No.

Q. Well, is a person, would you say that a person is justified, would be justified in actually relying on having confirmed reservation for a particular Allegheny flight when he's making business or personal plans? A. Yes, and I think our record in that area is identical, or is in cadence with the rest of the news. But I think that the person making reservation would have normal [13] expectancy of completing that flight as planned.

Q. And, in fact, do you find that people actually do make important plans relying on reservations that are confirmed by Allegheny? A. I don't—I haven't talked to passengers.

Q. You never heard from a passenger that—— A. Sure. But within that context?

Q. Well, I'm saying, is it your expectation or the company's expectation that, in fact, people really do rely on the reservations that they get from Allegheny when they're making their plans? A. Sure. Whenever you make a reservation, whether it be a restaurant or this, you would normally expect to have it completed, sure.

Q. Yes. And this would apply to passengers of course as well, prospective passengers, as well as to other people, right? A. Sure.

Q. Well, is there anything a person could or should do beyond obtaining his confirmed reservation, and purchasing his ticket, and complying with your checking rules to be sure that he's going to be accommodated on a flight? A. No. I think as a matter of practice you should [14] get to the airport in time to have your—get checked in and get your luggage and get the things done necessary.

Q. Is this—do you tell passengers this in your advertisement or tariffs? A. I don't know. No, I don't think so.

Q. Well, how would someone know what he should do beyond, you know, making a reservation and getting his ticket? A. Well, how much do you have to tell the passenger? Do you tell them to pack their bags, what to take with them, whether it's a warm climate or cold climate? There are some things if a person is going on a trip they ask questions that they're not familiar. If you try to give them a rundown of everything they should do, you would spend half an hour with each passenger.

Q. In fact, isn't it true that there are occasions when people were holding confirmed reservations for an Allegheny flight and it can't be accommodated or are not accommodated? A. That happens. That's true.

Q. What kind of occasions might that occur? A. I don't know. The record is clear on that. I'm not familiar with that record.

Q. What record? [15] A. Where there are over sales. What's the basis of your question, then?

Q. I'm just wondering. I'm trying to look at it from the passenger's point of view, what does he expect from Allegheny. I'm wondering what are the circumstances in which he might not get on a flight. A. Very minimal that he will not get on it.

Q. I suppose weather would be one, is that right, if the weather is so bad that the flight has to be canceled? A. Weather could be one.

Q. Mechanical difficulties would be another? A. Could be another.

Q. I understand that the government can take over some space from time to time? A. Perhaps.

Q. And there could be an error in reservations which would, or a computer breakdown which would leave you confirmed passengers for the flight; would that be true? A. It could happen.

Q. Yeah. And overbooking? A. It could be. And I think that the point that you're leading to, and we can save some time perhaps in getting to it, is that a problem has been present in the industry. I've [16] been in it, trying to find a balance between no-shows on the one hand and how much you should try to compensate for no-shows and empty seats. And there's a wide history in terms of attempts made to meet those, to the extent that I'm out with zero; that is, zero oversales, and zero seats unsold you overbook.

Q. What is overbooking? A. What do you mean "What is overbooking"? I just told you.

Q. Well, you were setting up a balance or attempts between finding the number of correct balance between no-shows and the number of passengers you carry. A. Right.

Q. And then you said to the extent that you come out to a zero excess that you overbook. I don't think I understand you. A. No. I said the extent that you come out with zero overbooking to zero oversales and zero empty seats. That's the optimum.

Q. That's the optimum.

I'm just asking you what is overbooking for the record. A. I have to go right back what do you mean, 'cause I [17] just got through telling you.

Q. Well, would you say the correct definition of "overbooking" would be the reservation or expectance of reservation for more seats on the flight than you have? A. We have a factor of two per cent.

Mr. Roberson: Wait just a minute. Listen to the question until he finishes it, rather than anticipate, because you

never know what he'll tell at the end of the questions if you do that.

The Witness: Okay.

By Mr. Robertson:

Q. Would it be correct to define "overbooking" as acceptance of more reservations for seats on a flight than you actually have space for? A. That would be correct.

Q. What is planned capacity? A. One hundred seats is to go out with one hundred passengers.

Q. That's all that it is? Doesn't the term imply a system as used by Allegheny, or an approach used by Allegheny? A. It could, I don't know.

Q. You're not familiar with the term? A. No.

[18] Q. Is it true that Allegheny under—that Allegheny intentionally overbooks certain of its flights? A. I don't know. I mean I don't know of an instance in this. I would assume that in the fulfillment of that policy there would be some overbooking.

Q. On what flights does this apply? A. I don't know.

Q. Are there any flights in which overbooking is prohibited? A. I don't know.

Q. Well, how does the planned capacity system work? A. I don't know.

Q. Who's in charge? A. The—Mr. Jenkins is responsible for that.

Q. You know who sets up the authorized number of oversales on a particular flight? A. No, I do not.

Q. You know whether it's set by a particular flight or by market? A. I don't know.

Q. How often has this been reviewed at the top levels in the company? A. I haven't—I'll tell you again. The basic area [19] that I look at is the one that finds the—is nearly the perfect balance that you can have between no-shows and oversales, oversales compensating for no-shows, not oversales or overbooking.

Q. All right. A. To the extent that their excess is either no-shows or oversales, I would have no way of knowing

except to investigate it. But as an industry matter, we're about in the middle portion of it.

Q. You're not aware that Allegheny's record on oversales is substantially above the industry average? A. No. In fact, I have the opposite impression that it is not. It's about at industry average.

Q. So when the system gets out of balance, you do get some reports about this, is that right? A. I would hear about it, I think.

Q. And have you received any of such reports? A. No.

Q. None that you can remember? A. I have not received any.

Q. What happens when the authorized number for a particular flight is reached and that number of reservations come in? [20] A. You mean on a given flight?

Q. Yeah. A. This flight is dispatched.

Q. I'm referring to when the reservations are received in advance of flight up to the top number that they will accept. A. I don't know.

Q. You know what closing flight is for reservations? A. No, I would have to guess at that. I don't know.

Q. What is confirming a flight? A. I don't know.

Q. Do you know where a flight is overbooked in advance Allegheny might have people call up some of the persons holding reservations to check and see whether they're actually going? A. I would think that a good administration would do that, yes.

Q. Do you know whether Allegheny does that? A. I don't know. No, I don't.

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[21] Q. What are the reasons that Allegheny will accept more reservations for a flight than it has seats available? A. If it occurs, it would be for the reason that I enumerated earlier, because statistically there would be a history of no-shows, and it would be for the purpose of compensating for a proven or statistical record of no-shows.

Q. Well, how does this help the passenger? A. What do you mean how does it help the passenger?

Q. Well, does it help the passenger? A. It certainly helps the passenger who wants to get a confirmed seat.

[22] Q. Any other way that it might help the passenger? A. I haven't thought about it.

Q. How does it help the company? A. It goes toward achieving the policy laid down earlier by having as few empty seats caused by no-shows responsible.

Q. Does this increase the profits of the company? A. It would have an obvious impact on it.

Q. Any other reasons for the policy? A. I have not thought of any.

Q. Does this, in fact, result sometimes in a passenger, who holds a confirmed reservation, being denied boarding on the flight? A. Occasionally that happens.

Q. Do you know what the other reasons are for denied boarding? We've talked about some of the equipment change problems and—— A. There are other reasons than just this one, but I'm not the one who can give you that, because I don't have the facts and I'm not familiar with all the operation of reservations in this area. So I have to sit here and tell you I haven't thought about it, and that's exactly the answer you're going to get.

Q. Well, if you don't know, just tell me. There's no problem.

[23] I suppose the computer error or just a breakdown in the reservations system would create this denying of boarding problem from time to time? A. I don't know.

Q. Do you know if free sale agreements might deny boarding sometimes? A. I don't know.

Q. Why are Allegheny's agents instructed to tell a passenger, who's been bumped because of an oversale, everything but the planned capacity is reason? A. You have information that indicates there are?

Q. I'd like to show you a copy of the *Allegheny Passenger Service Manual,* 6-100, at Page 4, and if you'd just like to read that over.

Mr. Roberson: Do you want to give a date for it, because they're revised from time to time.

Mr. Robertson: Yes. This bears the date August 15, 1970. It may have been subsequently revised, I don't know.

Mr. Roberson: Well, I submit that, having looked at that, it does not state what counsel says it does, namely, that you're instructed to tell them everything but computer breakdown, which is the way you phrased your question. It [24] does not so state.

Mr. Robertson: Well, we'll just explore that, then.

By Mr. Robertson:

Q. Mr. Barnes, would you tell me what the Allegheny agent is supposed to do when an oversale occurs, based on the Allegheny manual here. A. I would simply suggest you put this in the deposition, 'cause all I would be doing is reading from it.

Q. Well, I'd like you to tell me in your own words what that means (indicating). A. I'm not going to tell you in my own words. All I'm going to do is tell you this. Do you want me to read it?

Q. Yes. A. "Having been previously identified under the heading *Handling the Oversold Passenger,* try to separate the oversold passenger from other passengers. Be patient, courteous and tactful. Listen considerately. Let the passenger talk."

Q. Let me interrupt you for a second and ask you questions:

Why is the agent instructed to try to separate the oversold passenger from the others? A. Well, under the basic policy, the airplane is full, let the airplane go. Don't let him get on the airplane. [25] There's no purpose to be served on that.

Q. It has nothing to do with the fact that he might be irate, or angry, or create a scene of some kind? A. I suppose it could. I don't think it would be good tactics and good policy to do this in any business to get a person off the point where you can have a conservation with him.

Q. Why can't you do it right where he is? A. Well, that's the answer to your own question. Can you do that with a crowd around you?

Q. I don't know, sir. A. Well, I don't either. I know if I've got a problem I'd just soon sit down and discuss it with somebody, rather than be mixed up with a lot of other problems. I want that man's attention. So——

Q. Okay. A. Shall I go on and read it?

Q. Yes, please. A. "Apologize for the inconvenience and interruption to his travel arrangements. Explain the reason for the oversale——

"Caused by an unintentional air error made for the reservations of a flight. This type of error is infrequent and unfortunately impossible to rectify at this time. His [26] oversale report is immediately submitted to a central reservation office who investigates and follows up with the area office, which would be a travel agent, or airline, or one of our own offices.

"Or equipment substitution. (Explain in as much detail as possible.)

"Or weight restriction. (Explain in as much detail as possible.)"

Q. Is that the reasons that you're giving that are supposed to—— A. There are three reasons that are given as examples. There are others.

Q. Well, that's enough. That's the end of that part.

Where is the agent not instructed to tell the passenger about overbooking practice with Allegheny which may have caused his denied boarding?

Mr. Roberson: He's not instructed by that not to tell them.

Mr. Robertson: Let me rephrase the question. You're quite right.

By Mr. Robertson:

Q. Why is the fact that Allegheny does sometimes overbook its flights and does result from time to time denied [27] boarding not set forth as one of the reasons to tell

passengers? A. I don't see the point in it. You want me to give a whole dissertation on all of the factors that could cause an oversale?

Q. Well, isn't it somewhat misleading when an oversale maybe caused by intentional planned capacity practice of Allegheny not to at least tell the passengers what happened, instead of saying that it was caused by unintentional confirming in reservations? A. Never is there an intentional oversale. The assumption is that you are booked to the point that, taking into account no-shows, you do not have an overbooking.

Q. Well, isn't it true that there is intentional overbooking? A. Within the framework of the basic policy I laid down to you.

Q. The answer is yes, right? A. Yes, I guess it would be.

Q. But you don't think that you should explain the reasons for the oversale and concede that it might have been caused by intentional overbooking in flight? A. No. How would you know—how could you say that at that point? How do you know that is the cause of that [28] particular oversale? It could be caused by another airline having confirmed seat that had not been confirmed, or someone on the waiting list that had been confirmed by another agency or another airline. You don't know how it is. How are you going to tell the passenger, unless there's an intentional error with it, if in fact it's true?

Q. I asked you a few moments ago what are the causes for not boarding. A. As I say, there could be millions of problems.

Q. Is there any way that Allegheny can tell that a flight is overbooked in advance, other than telling if a plane—that other seats are left over, how much passengers are left over? A. I don't know. I would presume that there could be some way that you could tell when you have an overbooked situation.

Q. What is a PNL? A. Probably Passenger Name List.

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[29] Q. Is this a check-in tool? A. I don't know. I'm not familiar with these tools that are used in this operation end of the company.

Q. But if it's true that there are probably ways in which you could tell in advance when a flight is overbooked, and if the flight does fill up to capacity and there are denied boarding, you would have a pretty good idea at that point that overbooking might have been the cause; would that not be correct? A. I suppose so, but I'm not familiar with these procedures.

Q. Wouldn't it be fair to tell the passengers about that? A. It's a matter of opinion, and I'm going to be drawn into that. I recognize the basis for your question, but I can't answer that on that basis.

Q. What is Allegheny's policy on that point? A. Allegheny's policy is, again, to try to compensate for the statistical report for no-shows on a particular flight. I assume that that is done, and to that extent then, planned overbooking does occur.

Q. My question is, what is Allegheny's policy with respect to telling passengers candidly about what happened? [30]

A. We've outlined there what we tell the passenger, and if there are other factors that are not there, you can have a whole series of sheets that can possibly have things that could happen I can put down there, but you don't do that anyway.

Q. What steps has Allegheny taken to tell the public or passenger about its overbooking practice? A. I don't know. I wouldn't say one is necessary.

Q. As far as you know, none is? A. Yes, sir.

Q. Isn't it really true that Allegheny doesn't really want its passengers or the public to know the truth about this, that Allegheny intentionally overbooks its flight?

Mr. Roberson: Counsel, he's just told you that they don't intentionally oversale any flights. And I want to register an objection to this full line of questioning on the ground that it's irrelevant to this lawsuit, because Mr. Nader knew

fully well by reason of his previous experiences with Eastern Airlines, American Airlines that there is on occasion overbooking, and if you have an okay confirmed reservation, it doesn't necessarily mean that you're going to 100 per cent be seated on that flight, particularly since if you run up there right at the time the plane is supposed [31] to be taking off, as Mr. Nader did. I register an objection that these are irrelevant.

Mr. Robertson: Thank you. Well, I missed—have misunderstood the prior testimony, but I thought it was conceded that Allegheny does intentionally overbook its flights. It may not intentionally deny boarding, but it does, as a matter of practice, overbook its flights in advance; am I not correct?

The Witness: It was the end of the context of my description to you. The policy is the balance, no-shows and no-booking sales.

Mr. Robertson: And, in my words, that means that it does intentionally overbook its flight with the anticipation or the hope that some people would show?

The Witness: With the anticipation that they aren't going to show; that is right.

Mr. Robertson: And are passengers really entitled to be advised that their confirmed reservations may not be honored because of this?

The Witness: Yes.

Mr. Roberson: I object to that. It's irrelevant because Mr. Nader knew this. This lawsuit involves Mr. Nader and not anybody else. I instruct you not to answer.

[32] Mr. Robertson: It was already answered.

Mr. Roberson: Well, I move that it be stricken.

By Mr. Robertson:

Q. Based on Allegheny's actual experience, isn't it statistically certain that this overbooking is going to result in some denied boarders in some of its fights? A. Statistically, it's possible.

Q. Are you aware that Allegheny reports its denied boarder statistics to CAB on a monthly basis? A. I'm not aware of this. The assumption is there, of course, that that's done because the CAB couldn't present its own statistics for industry.

Q. Did you ever review these? A. No. You mean the reports we submitted or the CAB comparison?

Q. Either. A. I do the latter.

Q. Does the revenue gain to Allegheny from use of this planned capacity get the planes fuller or optimize the reservation with a number of seats? Does that revenue gain see the amount of denied boarding compensation and other costs or expenses that are associated with over access? A. I don't know.

[33] Q. Wouldn't this be a question that would be relevant, considering whether this was a good policy or not? A. Some areas or assumptions, and this certainly would be one, in that the number of oversales that result from this policy are not that common, and it doesn't take but few seats that are occupied that would otherwise be denied. To make the assumption a logical one, it's a gain for everybody, including the passenger who might have been told that he couldn't go because the flight was booked up. It is otherwise there.

Q. Well, then, isn't the assumption that Allegheny should intentionally overbook its flight, as we've described within the perimeters that you've discussed, in order to increase its profits, despite certainly that some people are going to be left standing at the gate? A. I'm not sure what your question means. What is the question?

Q. Well, isn't the assumption that Allegheny is making, or that you as Allegheny's top management officially making that, in order to increase or maximize profits you should continue this policy of overbooking flights——

Mr. Roberson: I object to the question on the ground it leaves out the possibility of minimizing losses [34] from

flying airplanes that are half empty. I object to the form of the question.

By Mr. Robertson:

Q. Why doesn't Allegheny stop this practice? A. You don't stop something unless there's a need to stop it. But the point that was just made here is a very right one; that is, that you're checked, you'd be losing a certain amount of your capacity on every flight, and it's a loss that you can never get back. And it's not good management to do otherwise than to try to compensate for that fact that the passengers are going to overbook, they're going to no-show, they're going to have changes, they're not going to have to take time to call in, and there's no redress in that area excepting that it's too late at that point to get people on that airplane.

Q. Well, isn't it rather unfair to penalize the people who do show up for the flight and have confirmed reservations? A. It doesn't happen that often to be that kind of a problem.

Q. How do you know it doesn't happen that often? A. Well, I would have heard about it, I think.

Q. Well, Mr. Barnes, I'd like to put in your hands for you to look at the reports that have been provided to me [35] by your attorneys, which are the ones filed with the CAB, concerning denied boarding.

And if you want to go over those, please take some time to do it. I want to ask you a few questions about the numbers of those reports. I've done a few calculations on that.

(Handing to the witness.) A. November, 1967.

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[38] Q. Is there any difference in the way, other than the numbers that are applied to the flight, to the particular flight and date in question, is there any difference between Flight 864 overbooking and other flights on Allegheny system? A. I don't know.

Q. You had any discussions at all about changing the

overbooking or the planned capacity system with other officials in the company? A. No, I have not.

Q. With any of the company directors? A. No.

[39] Is the Board aware of your overbooking practice? A. I doubt it.

Q. They've never approved it as far as you know? A. My earlier answer obtains.

Q. Excuse me? A. My earlier answer obtains. I told you I don't think they know anything about this.

Q. Have you ever looked into any alternatives to overbooking? A. No.

Q. Are you familiar with the concept of conditional reservation that can be adopted by some of the carriers? A. Only generally.

Q. What do you know about it in terms of how it works? A. I'm not familiar with the details, sufficient to discuss it.

Q. You know anybody in Allegheny that would be? A. No.

Q. Is this system used, the conditional reservation system used by Eastern? A. Various forms of it. I'm not sure what Eastern has.

Q. You're aware that Eastern officials consider it to be a great success?

[40] Mr. Roberson: There isn't any evidenciary proof of that.

Mr. Robertson: I'm asking Mr. Barnes whether he has any knowledge.

Mr. Roberson: He assumes that it is so.

The Witness: I don't know.

By Mr. Robertson:

Q. Did you ever discuss it with any Eastern official? A. No.

Q. Is there any specific reason Allegheny has not looked into this conditional reservation plan? A. None that I can say.

Q. You know whether or not the conditional reservation approach has demonstrated that overlooking is not really an economical necessity? A. No, I have not.

Q. It's your understanding that conditional reservation would be fairer to the passenger? A. I am not the way to the answer to your question.

Q. What other steps have you considered, if any, to deal with the no-show problem?

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[41] Q. What other steps has Allegheny taken, if any, to deal with the no-show problem? A. We have not taken any additional steps. We don't deal with this as a problem.

Q. Your no-shows as a problem? A. No. You asked me a question, what did we do with regard to oversales. Then you asked me—you turned the answer around and said right back your no-shows as a problem. I didn't say that at all.

Q. I don't mean to distort your testimony. I think we're having a communications problem.

I'm asking what steps has Allegheny taken, if any, other than its planned capacity approach, to deal with the problem of no-shows. A. I've told you none that I know of.

Q. Okay. And why not? A. I know it's not in my area, and it hasn't emerged as a problem that would call for my attention.

You have to answer in this that there's a study attempt made to keep this balance between no-shows and the [42] history of no-shows upon which the statistical record is based, that goes to the question of how much you overbook to compensate for that. So there's a continual revision and a continual study of that, I'm sure.

Q. But if I understand your testimony, you don't have any knowledge of how that system works at all? A. No, I don't. It is not of a nature or dimension that would cause me to be looking at it.

Q. Would you agree that a person, who is taking the care and the caution to book a reservation 3 or 4 days in advance of a flight, has complied with all the check-in and

other requirements should be entitled to be accommodated on a flight ahead of a pessenger who's just booked the night before? A. It would be impossible to administer that in any duties.

Q. Why is that? A. How are you going to determine it? Mr. Nader came to this 30 seconds after the gate closed. At that time, how are you going to determine what the order of priorities are in terms of when people got their ticket, or for that matter, who made those reservations.

An inquiry of questions come in is that made three weeks ago, picked his ticket up an hour before the departure [43] time. How do you determine there who made it first? You can't.

I'm not intending to ask you any questions. All I'm indicating that it's impossible to administer a program, and just saying for the good of the whole a hundred passengers instead of delaying them to go 3 or 4 or an hour trying to find out who did what first, you say go and——

Q. Am I mistaken in my understanding that Allegheny has the record of the exact time and date which every reservation for flight is made? A. I suppose you can go back and restructure it, I don't know.

Q. I understood that was on the passenger name record, the PNR? A. I don't know. I don't know where you got your understanding. I don't know that.

Q. So, as far as Allegheny is concerned, it really doesn't matter how far in advance the passenger has booked his reservation? A. Well, an oversale occurs and that flight is dispatched when the seats are filled.

Q. That's Allegheny's policy? A. Yes.

[44] Now, you mentioned that Mr. Nader arrived after the gate closed for his flight? I've been informed that you didn't have any knowledge, particularly of that episode. I ask how you know that. A. I have had discussions where counsel have looked at the record, of course, and there can be a question on this.

Q. Excuse me, sir? A. That can be a question on this.

Q. That's what you've been informed by someone else? A. Um hmm.

Q. Your attorney. A. I don't remember who it is.

Q. Have you discussed the particulars in the case with the other people in the company besides counsel? A. No. No.

Q. You haven't discussed it with Mr. Ferguson? A. No.

Q. Mr. Koloudny? A. No.

Q. Are you aware that great inconvenience maybe caused to a passenger who's denied boarding on a flight where he's holding a confirmed reservation? A. That's certainly possible.

[45] Q. You're aware that many of your passengers travel according to business reasons? A. A majority of them are.

Q. For example, they maybe on their way to an important business meeting? A. Could be.

Q. If they're denied boarding on a flight, isn't is true that it is possible that opportunities maybe lost forever?

Mr. Roberson: Now, Mr. Robertson, anything is possible, and I don't think it's material in this lawsuit what's merely possible.

Mr. Robertson: Well, I'm trying to inquire into Allegheny's knowledge of possible consequences when somebody is denied boarding.

Mr. Roberson: Anybody knows that it's possible that somebody is going to be upset if they don't get on boarder flights. So I don't think you're getting anywhere by beating this dog.

By Mr. Robertson:

Q. Do you know, Mr. Barnes, that somebody denied boarding on a flight might miss an important business opportunity forever? [46] A. It is possible that would happen.

Q. And isn't it true that other people, besides the passenger, maybe greatly inconvenienced such as people waiting to pick up the passenger? A. That is possible.

Q. Or other people's schedule to attend a business conference, or something or another? Is that possible? A. That's possible, too.

Q. Okay.

And isn't it true that other people also make their plans in many cases relying on someone else's reservation being honored for an Allegheny flight? A. Of course it is. Go ahead.

Q. Well, isn't it Allegheny's purpose to have people living in communities that it serves to be aware of Allegheny's services and feel that they can rely on these confirmed reservations? A. Of course.

Q. For example, if an important meeting were to be held in Hartford, the chief speaker was to come especially for the meeting from Washington, the meeting time depending on the speaker's ability to get there, is it Allegheny's intention to have the Hartford people feel that they can rely [47] on Allegheny to honor the reservation?

Mr. Roberson: I object to that. I think that the common assumption would be, if it's all that important, the man would allow himself 5 or 10 minutes leeway or book an earlier flight.

Mr. Robertson: Would you adopt the counsel's statement in that case?

The Witness: Yes.

Mr. Robertson: In other words, if it's a really important appointment, you should book another flight?

Mr. Roberson: No, I said an earlier flight.

Mr. Robertson: Well, that is another flight.

Mr. Roberson: No, that would indicate two flights. I don't approve of multiple booking.

Mr. Robertson: I'm certainly not trying to endorse a multiple booking approach.

By Mr. Robertson:

Q. Do you feel then that if a person has a really important business appointment in Hartford that he would be well-

advised to book an earlier flight? A. Look. The reservation and the offering of reservations suggest that the likelihood of being completed within the time planned is going to be excellent. And it's very, [48] very high; it goes to 100 per cent.

Any experienced traveler knows that there are occasions, whether it be for snow storms, other obstacles, whatever, that there is some possibility of that mission not being completed.

Now the person, the death of someone, is completely unsophisticated in that area, than there maybe some validity to your question, right? In this case, it is not.

Q. You know whether in this case, Mr. Nader's situation, that the denied boarding was caused by overbooking? A. I am not familiar with that case, as I told you, beyond preparation of this.

Q. Has anyone told you that this is one of the reasons for the denied boarding in this case? A. What was the reason for denied booking?

Q. Overbooking.

Mr. Roberson: We'll stipulate that it turns out that was the reason in this case. So——

Mr. Robertson: Okay.

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DOCUMENTARY EXHIBITS AT TRIAL

[Plaintiffs' Exhibit 4 –
Allegheny Memorandum]

F. R. Allen May 2, 1972

J. R. Shier

Oversale – 864/23APR DCA

Flight 864 on April 28 in DCA was oversold by 3. Below is a list of discrepancies found:

DCA/BDL

– R. L. Biscomb: PNR received from MIAEA April 25. Ticket issued by SDFEA April 25. PNR cancelled by MIAEA April 27 0837EST. Passenger shows boarded as a standby. New PNR received from MIAEA April 28 0617EST showing HL; message processed by PACER.

– J. Rucienski: Passenger shows as cancelled no-show; however, was boarded by DCA. Ticket issued by DCA ATO April 28.

	AU	FA	CD
Programmed PC	115	106	6
Adjusted PC		NONE	

0 – Number of time overbooked by CRC
1 – Number of times overbooked by nightly update
1 – Number of times oversold last four weeks
107 – Booked one hour prior

Flight closed April 27 1230EDT.

J. R. Shier
CRC Unit Supervisor

pg

[Plaintiffs' Exhibit 5 –
Allegheny Memorandum]

ALLEGHENY AIRLINES

EXHIBIT "5"

INTER-OFFICE CORRESPONDENCE

TO: A. Asumma DATE May 4, 1972

FROM: J. S. Jenkins

SUBJECT: Oversales

Per your memo of April 28, 1972, we have investigated the oversale on Flight 864 April 28. We are attributing the three oversales to boarding discrepancies and planned capacity. Of the passengers boarded DCA/BDL, one was on the waitlist and one had been previously cancelled as a no-show.

Flight 864 consistently departs with empty seats. It has only oversold once before. That was on April 24 by three. The posted leg load factor for April on this flight was 94%. This means an average of six empty seats on days the flight was booked full.

As you may be aware, we suffered a severe computer problem on April 13, which affected the inventory on many flights. In most cases, the processor continued to accept sales on flights which should have been closed. Although sometimes we were aware of a severely overbooked flight prior to departure, it was too late to alleviate the situation. In all cases, we advised the CSM at the affected station and attempted to arrange for extra sections when feasible. Your comment on the surge in oversales in BAL, BOS, and DCA is true. This inventory problem affected all large stations.

We are not blaming the sudden rash of oversales entirely on the inventory problems. As of the first of April, we have had all large stations under review, rebuilding flight histories in specific markets. For the present, we have lowered seat authorizations. I am sure, by now, you have noticed a change in the number of oversales.

Currently, we are investigating all flights oversold. When these investigations are completed and we have rebuilt flight histories in large stations, we will adjust planned capacity accordingly. However, we cannot realistically adjust PC to compensate for ticketing and boarding discrepancies and passengers cancelled in error as no-shows. If we can be of further assistance, please advise.

J. S. Jenkins
Director of Reservations

pg

cc: L. T. Ferguson
R. Garcia
G. Wigfield

[Plaintiffs' Exhibit 6 –
Allegheny Passenger Service Manual]

OVERSALE

An oversale is a passenger who holds confirmed ticket for a flight, and who checks in for the flight (this means appearing at our local ticket lift point before scheduled departure time), but who cannot be accommodated on that flight because of insufficient seats or seats being blocked. Give every oversold passenger a copy of "Notice to Passenger Denied Boarding", Form SS-112.

It is the oversold passenger's choice to accept or reject alternate transportation; unless it is on a Certificated Air Carrier of Public Convenience issued by the CAB. If a passenger accepts and uses alternate transportation, such as air taxis, limousine, cabs, rental cars, etc. and the alternate
C transportation is planned to arrive at the passenger's destination within 2 hours of his scheduled arrival (4 hours for Canada) do not pay D.B.C.

The term stop-over means a deliberate interruption of a passenger's trip which is scheduled to exceed four hours at a point between the place of departure and destination. A passenger traveling Williamsport to St. Louis with a connection in Pittsburgh is oversold. It is Allegheny's responsibility to get the passenger to STL, not PIT, within 2 hours of the original scheduled arrival time to avoid paying D.B.C.
C If unable to get to STL, D.B.C. is paid IPT-PIT.

When rerouting an oversold passenger to another airport within the same metropolitan area it is the passenger's choice to accept or reject the rerouting. A passenger is oversold with a destination of O'Hare. Alternate transportation to Midway arrives within 2 hours of his scheduled arrival. If the oversold passenger accepts and uses the alternate transportation, do not pay D.B.C.

If a passenger is "oversold" the cost of the services you provide him must not exceed the value of the refund of his ticket and the D.B.C. due him.

Airline employees and their eligible family members traveling Reduced Rate (Industry Discount) are not eligible for D.B.C. payments.

Exhibit 6

OVERSALE

Was the oversale caused by substitution of equipment?

YES → Offer the same services as for cancellation of a passenger's boarding station due to Controllable conditions.

NO

Is there a flight or flights on AL or other airlines that is planned to arrive at the passenger's ultimate destination or stopover point not later than 2 hours after the flight(s) on which confirmed space was held (4 hours for flights to and from Canada.)

YES → Rebook passengers:

Retrieve passenger PNR – Adjust space as required using PACER procedures.

If space is available,
- prepare A-38, Flight Interruption Manifest –

OR

- reissue ticket using PR-6 Rule 380 if travel is to be on two or more airlines.

NO

See Next Page.

OVERSALE (CONT'D)

Is there chartered surface transportation (bus, limo, taxi, car rental) that
- is acceptable and is planned to arrive at the passenger's destination or stopover point not later than 2 hours after the flight(s) on which confirmed space was held? (4 hours for flights to and from Canada.)
- charges less than the combination of boarding involuntary refund plus denied boarding compensation?

YES → Charter transportation.

Use A-6 as authorization.

Lift passenger's flight coupon, attach to Found Ticket, Form A-26, describing why ticket was lifted.

Send to Revenue Accounting in next Sales Report.

DO NOT PAY PASSENGER DENIED BOARDING COMPENSATION.

NO ↓

Is there an Air Taxi acceptable to the passenger that
- meets the requirements in 6-75.
- is planned to arrive at the passenger's destination or stopover point not later than 2 hours after the flight(s) on which confirmed space was held. (4 hours for flights to and from Canada.)
- charges less than the combination of involuntary refund plus Denied Boarding Compensation.

YES → DO NOT PAY PASSENGER DENIED BOARDING COMPENSATION.

NO ↓

Offer to pay Denied Boarding Compensation, and offer the same services as for Cancellation of a Passenger's Boarding Station or Deplaning Station due to Uncontrollable Conditions.

HOW TO COMPUTE THE AMOUNT AND PAY THE DENIED BOARDING COMPENSATION

C

1. Determine the value of the flight coupon. This value is the point-to-point fare without tax from the oversold boarding point to the destination shown on the flight coupon less any discount applicable to the coupon.

2. If the value of the flight coupon is — Pay the Customer

   $25.00 or less ---------- $25.00

   More than $25.00 ---------- Full value of coupon and not more than $200.00.

3. Prepare A-79, Refund Draft, for the amount of the compensation and make these special entries:

Ticket Form and Serial Number

From oversold boarding point to destination shown on flight coupon

"OS" and amount of compensation

Flight Number and Date

A77 STATION NO. 36
FORM 522216 SERIAL 402025
FROM PIT
TO NYC
☐ VOLUNTARY
☐ INVOLUNTARY
FLT. 240
DATE 17-12-70
REASON

FARE			1
TAX			2
OS	27	63	
TOTAL	29	63	12

N Note: All Allegheny Commuter Airlines pay Denied Boarding Compensation to oversold passengers.

- *If GTR is form of payment of passenger's ticket, make Refund Draft payable to "Treasurer of the U.S." Enter passenger's name, "GTR," and have passenger sign in the "Reason" box of the Refund Draft. Do not cash Draft for him.*

- *The passenger must receive the D.B.C. payment on the date and place of the oversale. If the passenger's alternate transportation departs before the Draft can be prepared, you have 24 hours to mail this to the passenger.*

NOTE: If passenger is a standby on a flight that is scheduled to reach his destination within the 2-hour time limit, do not pay D.B.C. immediately. Advise passenger to return for D.B.C. payment if he is not cleared on the standby flight.

4. Stamp back of Refund Draft with "Release of Liability" stamp.

5. Give the Draft to the passenger.

- The passenger may ask you to cash the Draft. If so, ask passenger to endorse draft. Include in next bank deposit.

C 6. For additional information, see Rules Tariff, Rule 380.

OVERSALES

An oversale is a passenger who holds confirmed ticket for a flight, and who checks in for the flight (this means appearing at our local ticket lift point before scheduled departure time), but who cannot be accommodated on that flight because of insufficient seats or seats being blocked. Give every oversold passenger Form SS-112.

Oversales are usually the result of:

- Reservations or travel agencies unintentionally confirming passengers on waitlisted flights.
- Ticket agents issuing tickets without verifying reservation status.
- Stations clearing standbys for a flight and overbooking downline waitlisted stations.
- Aircraft weight limitations caused by high fuel loads or restricted take-off weights.
- Substitution of equipment.

Use the following procedures to:

- clear overbooked flights.
- handle oversales when they occur.

Procedure

1. Check the PFS/Trip Dispatch to determine:

   - the number of passengers onboard through your station.

   - if there are NRSA, clergy, or desiring passengers that can be removed to accommodate confirmed passengers.

2. Inspect each flight coupon for flight/date and reservation status. Do not check in passengers with:

   - waitlist tickets,

   - open tickets,

   - tickets issued for another flight,

   unless you check the Passenger Name List (PNL) or retrieve the passenger's PNR and the passenger is holding confirmed reservation.

D

¢ 3. If steps 1 and 2 do not clear the overbooking, and the number of passengers actually checked in is greater than the number of seats available, before boarding the flight:

   - consider alternate transportation between your city and the passenger's destination.

   - select a local boarding passenger to be refused who will be least inconvenienced.

   Do not select passengers who are:

   - elderly
   - sick
   - incapacitated
   - unaccompanied children
   - holding connecting interline space
   - traveling as a group

¢ 4. Advise NRMR/NRSP passengers employed by Allegheny or other airlines about the overbooking. Tell them of later flights and ground transportation they may take. If they decide to stay on board, do not remove them but obtain their names and report it to the Director of Ground Services for his review.

¢ 5. If the oversale is not known until the flight is being boarded, (this applies particularly where gate check-in is used) the last passenger to arrive at the gate is the oversale and is not permitted to board. Selection is automatic. Do not delay the flight seeking a passenger who would be least inconvenienced.

¢ 6. Do not remove confirmed ticketed passengers already on board the flight from another station to clear an oversale.

Handling the Oversold Passenger

Try to separate the oversold passenger from other passengers; be patient, courteous, and tactful. Listen considerately; let the passenger talk.

Apologize for the inconvenience and interruption to his travel arrangements.

Explain the reason for the oversale

- Caused by an unintentional error made in confirming reservations for the flight. This type of error is infrequent; and unfortunately, impossible to rectify at this time. An oversale report is immediately submitted to our Central Reservations office, who investigates and follows up with the erring office which would be a travel agent, other airline, or one of our own offices.
- Or, equipment substitution. (Explain in as much detail as possible.)
- Or, weight restriction. (Explain in as much detail as possible.)

Remove the passenger's baggage from the flight.

Give oversold passenger copy of "Notice to Passengers Denied Boarding," Form SS-112.

There are many services which can be offered to the oversold passenger. These services are found in Section 6-99.

You must also offer Denied Boarding Compensation (DBC) to oversold passengers meeting certain conditions. See Section 6-99.

REPORTING AND INVESTIGATING OVERSALES

Who	Does What
Oversold Station	1. Complete an original and 3 copies of the Oversale Report Form SS-119 for each oversold passenger whether DBC is paid or not.
N	2. Call Central Res Control in PIT CRO, Ext. 271 or 262, and report the oversale.
	3. Retrieve a hard copy of the oversold passenger's PNR and PNR history using your 1977 agent set.
	4. Attach the copy of PNR and PNR history to the Customer Relations copy of SS-119.
	5. Give report to your Customer Service Manager.
Customer Service Manager	6. If no contact with the passenger at the time of the oversale: THEN call each oversold passenger unless you are positive he/she is satisfied with the explanation and alternate service provided. In either case, enter a brief summary on the back of the SS-119 and sign it. Examples: Passenger very irate. VIP. CSM called passenger at home, explained circumstances and apologized. Passenger very understanding. (signed) C.S.M.

continued . . .

REPORTING AND INVESTIGATING OVERSALES (CONT'D)

Who	Does What
Customer Service Manager	Examples: (cont'd)

Passenger was G.I. Couldn't care less about delay. Happy with $25.00.

(signed) C.S.M.

PSR Smith handled passenger. Passenger satisfied with alternate transportation.

(signed) C.S.M.

7. Distribute SS-119:

Original - Director of Reservations.
Copy #1 - Director of Customer Relations with copies of PNR and PNR history attached.
Copy #2 - Station file.
Copy #3 - Your Regional Director.

Submit completed SS-119's no later than 72 hours after the oversale occurs.

ERSALE REPORT SS-119

ATION		FLIGHT NO.	FLIGHT DATE
ME	(Last)	(First)	MRS. ☐ MISS ☐
DDRESS	(Street)	(City)	(State) (Zip Code)
ELEPHONE	(City)	(Number)	
CKET NO.	DATE AND PLACE OF ISSUE		FIRST FLIGHT SEGMENT

ERNATE ACCOMMODATIONS AND SERVICES PROVIDED

	COST

SPOSITION OF CONTINUING/RETURN SPACE

USE OF OVERSALE

	AMOUNT OF DBC PAID

STRIBUTION: ORIGINAL - DIRECTOR, RESERVATIONS
COPY 1 - DIRECTOR, CUSTOMER RELATIONS
COPY 2 - STATION FILE

PLAINTIFFS EXHIBIT 14–CORRESPONDENCE RE OVERSALES

[Letter to Allegheny]

May 2, 1969

The President
Allegheny Airlines, Inc.
Washington National Airport
Washington, D.C. 20001

Dear Sir:

I was scheduled with a confirmed reservation out of Washington National on your flight No. 864 last Tuesday morning, April 29, at 10:30 A.M. A vice president of our company and general counsel was scheduled out together with me on the same flight. We arrived at the airport and checked in at your main ticket counter upstairs in the main lobby at about 9:45 A.M. We were accepted on your flight No. 864, our bags checked, and we were told that the flight would leave from Gate No. 7 – gate time was noted to be 10:10 A.M.

We lingered around the main lobby for a short period of time, then proceeded on to Gate No. 7 arriving there about 10:15 A.M. We walked by the desk at the gate into the waiting room without being challenged by anyone although two attendants were at the desk at the time. We sat down in the waiting room and were advised by one of the attendants via the speaker system that Flight No. 864 was delayed and would now depart at 10:50 A.M.

We left the waiting room, walked down the hall and back, and reentered the waiting room – again not being challenged by either attendant. The flight had not been called at 10:45 so my associate went to the desk at the gate to inquire about the flight. He was asked for his ticket and called to me that I needed to present my ticket.

When I presented my ticket, quite a bit of confusion took place. I was finally told that due to an error by the computer the flight had been over sold. I was not allowed to board the flight, but I was told that I would be scheduled on a later flight that was to leave two hours later.

My associate and I were on a very tight schedule. We had a very important appointment scheduled at Springfield, Massachusetts, an appointment that was to last all afternoon. We had another appointment scheduled in Hartford, Connecticut the next morning that would carry until our departure time at 3:05 P.M. Wednesday for our return trip to Harlingen. Needless to say we were severely inconvenienced by the delay.

I was escorted back to the main lobby by your Mr. Henry Rouson. There I was offered a check in the amount of $29.60 for my inconvenience – that being the one-way fare from Washington to Bradley Field. Mr. Rouson asked me to endorse the check and he would pay me in cash, at the same time calling my attention to the wording that I would endorse. My endorsement would free Allegheny from further liability. I refused to endorse the check – thus ending our conversation.

I might add that I continued on to Bradley field, arriving for my appointment 3½ hours late. I would also like for you to know that I was treated at all times with courtesy and respect by Mr. Rouson and the rest of the personnel, for which I am grateful.

Yours very truly,

HYGEIA DAIRY COMPANY
By: Jas. H. Alexander

JHA:ld
cc: Mr. R. Ames
Customer Relations

[Letter from Allegheny]

CLOSED No. 59-47
May 08, 1969

Mr. James Alexander
Box 751
Harlingen, Texas

Dear Mr. Alexander:

Mr. Barnes has asked me to reply to your letter of May 02. May I extend a sincere apology for the inconvenience incurred.

We appreciate your taking the time to advise us of the circumstances related to your travel with us on April 29. A copy of your correspondence is being forwarded to our Vice-President of Customer Service for review in an effort to prevent recurrence.

Please accept the enclosed check for $29.60. This is paid to you because of our failure to accommodate you to your ticketed destination within two hours of your originally scheduled arrival time.

May I also add that it is a pleasure to relay your appreciative comments on our service to all concerned.

Thank you for allowing our review. We look forward to the opportunity to welcome you aboard many times in the future.

Sincerely,

R.S. Ames
Director, Customer Relations

RSA:ck
Enclosure
cc L.O. Barnes

bcc: P.D. Brennan—For your information. Thank you.

bcc: R.W. Bussen—Credit DBC for $29.60 per ticket no. 033-482-647-079. Thank you.

[Letter to Allegheny]

THE DEPUTY POSTMASTER GENERAL
Washington, D.C. 20260

June 11, 1969

Dear Mr. Barnes,

It is disturbing to me, to say the least, that I have had no explanation as yet from you as to the exceptionally poor service and treatment which my wife and I experienced with your company at the Hartford/Springfield Airport. This lack of any response is especially aggravating since the incident was called to your company's attention on June 2, 1969, by Mr. Batrus, my Executive Assistant, in direct phone contact with your Vice President, Mr. Brennan.

After having been confirmed and ticketed in advance for return to Washington on your flight 931, Sunday, June 1, 1969, and having again confirmed by phone to your station at Hartford at 8:00 a.m. on the day of departure, I was told on arrival a half-hour before flight time that no seats were available for me and my wife.

It was very important that I return to Washington at that time, and despite my plea for assistance in arranging transportation, even by charter if necessary, I received no cooperation whatsoever. In fact, I received only abrupt and discourteous disregard of my request by your personnel, and was put to the added inconvenience of having to arrange myself for a charter flight at a cost to me of $330.00.

I felt you should know this since I obviously must be concerned with the general quality of performance of certificated air carriers.

Sincerely,

/s/ E. T. Klassen
E. T. Klassen

Mr. Leslie O. Barnes
President, Allegheny Airlines
Hangar 12, Washington National Airport
Washington, D.C. 30001

[Letter from Allegheny]

October 17, 1969

Mr. F. E. Batrus
Executive Assistant to the
Deputy Postmaster General
Office of the Deputy Postmaster
General
Washington, D.C. 20260

Dear Mr. Batrus:

I first want to apologize for the inconvenience Mr. and Mrs. Klassen were exposed to when they attempted to travel with us on June 1st.

I have attached our customer relations adjustment check in the amount of $301 to cover their additional expenses.

I sincerely trust they their future travels with us will be most pleasant and should they incur any difficulty I would appreciate hearing from them.

Sincerely,

L. Thomas Ferguson

LTF:e
attach.
bcc: R.S. Ames
W.J. Meyers

[Letter from Allegheny]

September 16, 1969

Mr. John N. Hansson
12409 Braxfield Ct. No. 4
Rockville, Maryland 20852

Dear Mr. Hansson:

I am in receipt of a copy of your correspondence to Eastern Airlines regarding your decision not to pay for the air transportation provided by Allegheny between Hartford and Washington.

This is indeed distressing since the airlines are prohibited by law from providing free transport and must process for collection. I am hopeful that this reply to you will not require any action that may reflect upon your excellent credit status.

The oversale at Hartford was indeed unplanned, and I wish to assure you that Allegheny does not purposely oversell any flight. As evidenced by our paying $660.00 for the two Air Taxi Aircraft, our concern was to provide the air service to your destination promptly even though the value of all of the tickets for the passengers who were on the Air Taxi Aircraft was only $228.75. As you may note, it was indeed not only an expensive alternative service arrangement but assumed in the recognition that on Labor Day weekend alternate services were at a minimum.

I have determined that the first Air Taxi (N5844) arrived at the Page Airways gate (here at National Airport) at 7:45 p.m. Your Air Taxi (N6996L), after the short delay to service a switch, arrived at the Page Airways gate at 8:05 p.m.—or one hour and fifty-one minutes after flight 816. It is also my understanding that the Passenger Service

Representative who served you at Hartford called you at a later time at your home to again apologize for the service failure to you and to your wife.

I have enclosed my Customer Relations check for $10.00 in reimbursement of the dinner you obviously missed due to your delay of almost two hours.

Hopefully, previous experiences with our airline have established that this was an exception to our usual efforts.

Certainly, your continued patronage is desired.

Sincerely,

R.S. Ames
Director–Customer Relations

RSA:kg
Enclosure

bcc: EAL– I suggest a wait of 10 days and then a friendly reminder "collection" note in the tone of "we have received a copy of Allegheny's reply and knowing your check is enroute to us wished to add our apology for the incident experienced."

Thank you.

bcc: R.W. Bussen.

[Letter from Allegheny]

March 18, 1970

Mr. J. Henry Korson
Professor of Sociology
The Commonwealth of Massachusetts
University of Massachusetts
Amherst, Mass. 01002

Dear Mr. Korson:

This will acknowledge receipt of your letter of January 2. May I extend my sincere apology for the inconvenience incurred and for this unintentional delayed reply.

I can certainly understand your displeasure with us over this matter and I agree that the oversale of this flight or any other flight is not the kind of service our valued customers deserve. Please be assured that each and every oversale is investigated with corrective action instituted in an effort to prevent recurrence.

I have thoroughly reviewed the reports submitted on this matter by our managers at both Hartford and Providence. The flight was actually oversold by six passengers. At the last minute before departure, it was discovered that there was still one empty seat and the first oversold passenger was immediately boarded. After the flight departed, our Passenger Service Representative discovered that a Marine had failed to board the flight after checking-in for personal reasons not known to us.

All oversold passengers were boarded on Flight 966 to Baltimore, and a limousine was provided to National Airport in Washington. Since it did not arrive within the two hour time limit as required by Civil Aeronautics Board regulations regarding oversales; denied boarding compensation was paid to each oversold passenger involved.

Oversales are few when compared to the number of departures even though any of the thirty-eight major airlines and more than 5,000 travel agencies (world-wide) can sell space on Allegheny. However, through human or computer error if we are not properly advised, our total number of commitments do occasionally exceed our total number of seats available.

According to our records your son's tickets and those of a Mr. LaBella were confirmed and issued by Eastern Airlines at Charlotte, North Carolina. There were several other passengers who also held confirmed tickets for this flight for which we show no records.

While you are correct that Allegheny does provide the majority of the flights serving Hartford, may I emphasize that Allegheny is not the only carrier permitted by the Federal Aviation Administration and the Civil Aeronautics Board to operate this route.

Again, my sincere apology for the inconvenience incurred by your son. I sincerely hope that your travels with us since this time have been in evidence of our desire to properly serve you.

Sincerely,

ALLEGHENY AIRLINES
R.S. Ames, Director
Customer Relations

RSA:rce
cc Civil Aeronautics Board
–Your file no. 70-158.
Thank you.
Senator Edward Kennedy
Senator Edward Brooke
Mr. Ralph Nader
Congressman Sylvio Conte
bcc: L.T. Ferguson/J. Jenkins
E.I. Colodny P.D. Brennan

[Letter to Allegheny]

45 Westbrook Street
Hartford, Conn. 06106
March 1, 1970

Allegheny Airlines
Washington National Airport
Washington, D.C.

Dear Sirs,

I am writing with reference to an unfortunate experience that I had while attempting connections via Allegheny Airlines from Bradley International and Washington National on February 22nd. Having made reservations on flight 816 I had arranged connections from Washington to Charlottesville, Virginia in accordance with the expected time of arrival of flight 816.

As a result of what had appeared to be a situation of just too many reserved tickets being sold for the flight, there were at least ten other individuals along with myself that were not allowed to make flight 816.

I am not in a habit of writing notes of complaint, but I was surprised to have this happen to me while attempting connections with Allegheny. I do an extensive amount of traveling by air and I must say on any of my previous flights with your airline have been most enjoyable. It was just that as a result of the difficulty that I experienced I missed an important meeting and incurred additional expense in having to extend my trip several days to accomplish my duties.

Sincerely,

/s/ Demetrios Tsacoyeanes
Demetrios Tsacoyeanes

[Letter from Allegheny]

TSACOYEANES Closed 30-250

- - - for bringing to our attention the experiences encountered on your recent trip between Hartford and Washington, D.C.

May I extend my sincere apology for the inconvenience incurred as a result of this oversale. I have reviewed our records regarding this matter and have determined that your reservations were cancelled as a result of late check-in at the ticket-lift position. Therefore, I am unable to forward any denied boarding compensation.

I hope your future travels will again include Allegheny and satisfaction with our services will warrant your continued patronage.

Sincerely,

/s/ R.D. Meade
R.D. Meade, Supervisor
Customer Relations

3/23/70

[Letter to Allegheny]

Miss Rhoda Goldberg
620 21st St. N.W.
Rm 504
Washington, D.C. 20006

Mr. Richard Ames
Director of Customer Relations
Allegheny Airlines, Inc.
National Airport
Washington, D.C. 20001

Dear Mr. Ames:

On Sunday Feb. 22, I arrived at Bradley Field (Hartford, Conn.) at approximately 4:45 P.M. to catch Allegheny Flight No. 816 leaving at 4:59 P.M. & arriving at 6 P.M. at National Airport. I had purchased a round trip ticket at the American Security Building at 21st & Pennsylvania Ave. N.W. on Thurs. Feb. 19 – I had gone out of my way to do this just so that I would encounter no difficulties in the course of my travels . . . little did I know what was in store for me! Upon arriving at the gate, a Mr. Rickey nonchalantly told me he was sorry, but the flight was full, and since I had not been within the gate of the departing flight ten minutes prior to take off (which I was!) he could not accommodate me at all!! This information was not printed on the ticket in any place whatsoever – I had specifically read it to see if there were any directions I would have to follow since I already held my ticket . . . It is only printed on the first page of your schedule . . . No one had ever pointed this out to me, and I had never at any time been made aware of this provision!! The next flight was 8:09 so I had to spend three hours in the "pleasant" atmosphere of Bradley Field . . . it was not a direct flight so it took two hours instead of one . . . and I had to suffer the uncomfortable feeling I get from not one, but two take offs and landings . . . . my luggage was on the first flight, which did not add to a pleasant mental state . . . and someone was awaiting me at National who nearly panicked since I could not reach him. . . .

Mr. Ames, is this anyway, to run an airline?? . . . I would appreciate being reimbursed for my time and aggravation, merely caused because your airline overbooked a flight which I felt had assured me of passage . . . . I do a great deal of travelling on Allegheny . . . . so before I delve into the legal aspect of such a situation, I would appreciate your reimbursing me for this flight.

Sincerely,

/s/ Rhoda Goldberg

[Letter from Allegheny]

GOLDBERG, RHODA Closed

- - - for writing and for your patience with us.

Enclosed is my customer relations check for $25 equal to the denied boarding compensation payment.

I hope all other travels with us have been as desired and without a similar inconvenience. We do indeed desire your continued patronage.

Sincerely,

R.S. Ames, Director
Customer Relations

3/31/70

BCC: E.I. Colodny/P.D. Brennan – We had 107 for 100 passenger flight. We cancelled on 10 T/L *to correct our error.* Per passenger, she arrived prior to 10 T/L.

[Letter from Allegheny]

May 1, 1970

Dr. Paul Weiner
Associate Professor of Economics
The University of Connecticut
Storrs, Connecticut 06268

Dear Dr. Weiner:

Thank you for providing me with a copy of your April 24 letter to the Federal Aviation Administration. Although you will undoubtedly receive a response from that office, I appreciate the opportunity to respond – especially in view of the unfortunate circumstance which prompted you to write.

First of all – I deeply regret the fact that you were denied a seat on one of our March 19 flights to Washington. At this writing I am not familiar with the circumstances of that flight. In today's computerized environment, this should not have happened and we are probably more interested in the cause than even you are.

Next, I am privileged to respond briefly to the questions posed in your letter:

(1) Northeast, American, Eastern, TWA and Allegheny Airlines are all certificated to provide nonstop service in the Hartford-Washington market. For reasons with which I am not familiar, only Eastern and Allegheny provide nonstop service; the bulk of which is provided by Allegheny.

(2) Competition invariably breeds efficiency, although it doesn't always improve costs. More importantly perhaps – particularly in a service com-

pany such as ours – competition tends to improve personnel performance. Your observation suggests that you might have had an unsatisfactory experience on Allegheny on another occasion.

(3) I am not certain that I understand your third question. Airline accounting procedures require conformance in all cases to the Civil Aeronautics Board System of Accounts. Internally, for tax purposes or other reasons, the ultimate report may vary from the procedure. Depreciation is, of course, a major cost factor, and does vary from one airline to another. For the most part, the schedules used reflect a corporate judgment as to the useful life of the equipment. Generally speaking, jet aircraft are depreciated over a 12-15 year span to a residual value of 15 per cent; propeller aircraft are usually 10 years or less, also to a 15 per cent residual.

(4) I am not clear as to your last question. Specifically, I do not understand how high managerial expenses could mask low earnings; I would think the reverse would be true. I suggest that an airline's Breakeven Load Factor (the percentage of seat occupancy required to break even) would be a better criterion. In other words, a higher-than-average breakeven requirement might indicate the tendency you appear to be seeking. In this connection, regard Allegheny, Continental, Northwest and National who are at or slightly below a 40 per cent requirement; the industry average is currently around 45 per cent, I believe.

I trust the foregoing will answer, in part, your questions. Again, I am most sorry that your experience (perhaps your first) with Allegheny was an unpleasant one. I trust your next flight with Allegheny will demonstrate that your experience was, in fact, unusual.

Sincerely,

L. O. Barnes

LOB:jih

cc: Mr. John Dregge, Director
Office of Community & Congressional Relations
Civil Aeronautics Board

Mr. John Shaffer, Administrator
Federal Aviation Administration

bcc: Mr. E.I. Colodny
Mr. L.T. Ferguson/Mr. R.S. Ames

[Letter from Allegheny]

January 11, 1971

Dr. Paul Weiner
Associate Professor of Economics
Department of Economics
The University of Connecticut
Storrs, Connecticut 06268

Dear Dr. Weiner:

Thank you for your letter of December 30 concerning the Denied Boarding Compensation paid you on March 19 at the time of the oversale incident.

I believe the newspaper article enclosed with your letter has a misleading headline which may cause some misunderstanding. In the article itself, however, it does state, "Fed-

eral regulations state that any passenger bumped despite holding 'confirmed reserve space' is entitled to a refund plus an equal penalty payment . . ." In your instance you were rebooked on an Eastern flight to Baltimore plus a taxi to Washington payment for which was via your original ticket for the Allegheny flight. As you noted, the Denied Boarding Compensation amount of $30 was also paid to you which amount equalled the one way fare between Hartford and Washington at that time. Had you decided to *not* make the trip to Washington at all, then you would have been entitled to a full refund on your ticket *plus* the Denied Boarding Compensation.

We at Allegheny find oversales to be most distressing for us as we know them to be for our passengers. In this connection in August of 1970, Allegheny introduced a computerized name and flight reservation system and this has reduced the number of oversale incidents considerably. Enclosed is a copy of our "Air Commuter" magazine describing this system starting on page 8.

Please be assured of our continuing efforts to offer the best service possible to our passengers.

Sincerely,

L. O. Barnes

Encl.
bcc: Mr. L.T. Ferguson/Mr. R.S. Ames

DEFENDANT'S EXHIBIT A

(6-31C)

DON W. CROCKETT
ATTORNEY AT LAW
Suite 880
1700 Pennsylvania Avenue, N. W.
Washington, D. C. 20006
June 19, 1972

Mr. Edwin I. Colodny
Executive Vice President
Allegheny Airlines
Washington National Airport
Washington, D.C. 20001

Dear Mr. Colodny:

Enclosed herewith for your information is a copy of a complaint resulting from the dishonoring of a reservation for Mr. Nader by your company on April 28, 1972. The complaint fully sets forth the facts surrounding the incident. We intend to file this complaint on Friday, June 23, 1972.

We are also returning herewith your company's draft dated April 28, 1972 in the amount of $32.41 which we reject as a wholly inadequate offer of settlement.

Recent CAB statistics reveal that the airline industry is apparently unwilling to take the steps necessary to eliminate the oversales of their flights, a problem which has plagued consumers for many years and which remains a matter of serious public concern.

If you are interested in discussing the settlement of this matter before the complaint is filed, please let me know before June 23, 1972. We anticipate that any such settlement would include an assurance on Allegheny's part that it would take immediate steps to eliminate overbooking and oversales.

I have been delayed in moving to the above address and can be reached at 1001 Connecticut Ave., Suite 800, Telephone: 628 7234.

Sincerely,

Don W. Crockett

Don W. Crockett

cc Ralph Nader
C.C.A.G.

Exhibit A

DEFENDANT'S EXHIBIT D – CAB NOTICE EDR-109

STRATTON
EDR-109

UNITED STATES OF AMERICA
CIVIL AERONAUTICS BOARD
WASHINGTON, D. C.

Economic Regulations
Docket 16561
Dated: January 10, 1967

PART 221 - CONSTRUCTION, PUBLICATION, FILING AND POSTING OF TARIFFS OF AIR CARRIERS AND FOREIGN AIR CARRIERS

PART 250 - PRIORITY RULES, DENIED BOARDING COMPENSATION TARIFFS AND REPORTS OF UNACCOMMODATED PASSENGERS

NOTICE OF PROPOSED RULE MAKING

Notice is hereby given that the Civil Aeronautics Board has under consideration an amendment to Part 221 and a proposed new Part 250 of the Economic Regulations. The new Part would require carriers to establish and file with the Board priority rules for determining which passengers holding confirmed reserved space shall be denied boarding on an oversold flight. In addition, the amendment to Part 221 and the new Part 250 would require carriers to file tariffs providing specified denied boarding compensation to such passengers. Finally, the new part would require carriers to file reports of unaccommodated passengers.

The principal features of the proposed amendment to Part 221 and the new Part 250 are set forth in the Explanatory Statement, and the proposed amendment and new part are set forth in the Proposed Rules. These regulations are proposed under the authority of sections 204(a), 403, 404, and 411 of the Federal Aviation Act of 1958, as amended (72 Stat. 743, 758, 760, and 769; 49 U.S.C. 1324, 1373, 1374, and 1381), and section 3

Exhibit D

of the Administrative Procedure Act (80 Stat. 383; 5 U.S.C. 552).

Interested persons may participate in the proposed rule making through submission of ten (10) copies of written data, views or arguments pertaining thereto, addressed to the Docket Section, Civil Aeronautics Board, Washington, D. C. 20428. All relevant matter in communications received on or before February 16, 1967, will be considered by the Board before taking final action on the Proposed Rules. Copies of such communications will be available for examination by interested persons in the Docket Section of the Board, Room 710 Universal Building, 1825 Connecticut Avenue, N. W., Washington, D. C., upon receipt thereof.

By the Civil Aeronautics Board:

HAROLD R. SANDERSON
Secretary

(SEAL)

EXPLANATORY STATEMENT

On October 12, 1965, the Board issued a notice of proposed rule making, EDR-95, 1/ to consider a proposed new Part 250 providing for notice and other requirements with respect to overbooked flights. In addition, the notice advised that the Board has under consideration certain amendments to Part 221, which would require carriers subject to Part 250 to include in their tariffs their criteria, practices and rules for determining passenger priorities applicable to instances where confirmed reservations exceed the capacity of the aircraft on a scheduled flight. The notice afforded an opportunity to interested parties to participate in the proposed rule making through submission of their views or arguments.

The Air Transport Association of America (ATA) has consolidated and submitted comments of 31 air carriers. In addition, supplemental comments have been submitted by a number of carriers. 2/ The carriers unanimously oppose the rule proposed in EDR-95, particularly the provisions of the new Part 250 requiring notice to passengers of an overbooked condition. Upon consideration of these objections, and of other factors hereinafter set forth, the Board is hereby proposing alternative regulations to deal with the problem.

1/ Docket 16563; Part 221 - Construction, Publication, Filing and Posting of Tariffs of Air Carriers and Foreign Air Carriers; Part 250 - Notice and Other Requirements of Overbooked Flights.

2/ Alaska Coastal-Ellis Airlines, Northern Consolidated Airlines, and Wien Alaska Airlines, jointly; Ozark Air Lines; Pan American World Airways (supported by Pan American-Grace Airways); Trans Caribbean Airways; Trans-Texas Airways; Trans World Airlines; and United Air Lines.

The Board has for some years been concerned with the problem of oversales - the failure of air carriers to accommodate at flight departure time passengers holding confirmed reserved tickets on the flight on the ground that space is not available. 3/ While the number of passengers holding confirmed reserved space who are denied boarding is not large relative to total enplanements, in absolute terms the number is substantial. Thus, evidence submitted by the carriers in the Overbooking Practices of Trunkline Carriers' Investigation, Docket 11683, and information received thereafter, indicate that in each of the years 1963 and 1964 approximately 50,000 passengers with tickets for confirmed reserved space were denied boarding on flights in domestic trunk and local service.

The oversales problem, therefore, is a severe one. It causes distress, inconvenience and damage to passengers. It impairs the public image of air carriers, casting doubt on the integrity of their reservations practices. Clearly, it is incumbent on the Board and the carriers to do all within their powers to eliminate oversales to the extent feasible.

The crux of the carriers' comments, as submitted by ATA, is that the proposed notification rule (1) would be largely unworkable; (2) would create anxiety and confusion on the part of the traveling public, severely weakening public confidence in air carrier reservations systems;

3/ Strictly speaking an oversale also occurs when a passenger is not accommodated in the class of service for which he holds confirmed reserved space, but is seated in a lower class of service ("downgraded") or a higher class ("upgraded"). However, this type of oversale presents a far less severe problem.

(3) would increase unnecessarily, and at an undue cost to the industry, the already-heavy workload which must be handled within extremely narrow tolerances by airline reservations systems; (4) would cause the public to make a great number of duplicative and protective reservations; (5) would increase the already rapid turnover of reservations within the last 12-24 hours before departure; and (5) would increase the troublesome "no-show" and late cancellation problems.

In light of carrier comment and other considerations, the Board has tentatively determined not to finalize EDR-95. Rather, we propose to deal with the oversales problem by other means for the following reasons: (1) the proposed notice requirement of EDR-95 would have necessitated substantial changes in the reservations practices and systems of carriers, and the Board is not prepared to require such changes in a system which has, on balance, worked reasonably well in the public interest; (2) various measures are available to the carriers to reduce the dimensions of the oversales problem by limiting or curtailing certain aspects of their reservations practices; (3) finally, the Board believes the oversales problem can be substantially reduced by the proposals herein to require carriers (a) to make prompt, effective and adequate compensation to oversold passengers, (b) to establish priority rules for determining which passengers holding confirmed reserved space shall be denied boarding on oversold flights, and (c) to file reports of unaccommodated passengers. These matters will next be discussed seriatim.

1. As indicated above, the primary thrust of EDR-95 was directed toward the practice of carriers of deliberate or controlled overbooking. This practice stems from the fact that there is substantial reservations turnover before flight departure time occasioned by changes in passengers' plans and cancellation of their reservations. In addition, the practice is used to allow for multiple reservations made by some passengers and for "no-shows" - passengers who neglect to cancel reservations they do not intend to use. Reservations turnover can be projected and compensated for by booking in excess of the capacity of the aircraft to a predetermined extent. By carefully controlling overbooking in this manner on certain flights, carriers can reduce the chance of aircraft departing with empty seats. At the same time, through the carriers' acceptance of reservations in excess of inventory, passengers are able to secure space on flights which can in fact accommodate them and are also benefited by being offered maximum flexibility in securing, cancelling and changing reservations without charge or penalty. However, where carriers overestimate reservations turnover on a particular flight, overbooking can result in oversales and passengers holding confirmed reserved space are denied boarding.

The carriers, however, contend that overbookings alone do not cause oversales nor are they even the chief cause of oversales. In support of this position ATA has submitted the results of special surveys conducted by four carriers as follows:

	Boarded	Overbookings	Oversales
Carrier "A" (1 day)	45,000	700	8
Carrier "B" (2 days)	22,000	323	11
Carrier "C" (5 days)	125,000	635	3
Carrier "D" (48 days)	51,273	70	2

In the cases of Carriers "B" and "D", it is stated none of the oversales were attributable to the overbookings and in the cases of "A" and "C" the overbookings were only a contributing factor.

There is nothing in the substantial body of data before the Board which controverts the carriers' claim that overbooking is not the major cause of oversales. Among other causes of oversales are reservations practices such as "free-sale" and "block ticketing". In addition, oversales are caused by such factors as (1) substitution of lower capacity aircraft because of maintenance or other operational consideration; (2) errors committed by personnel of the carrier denying boarding to the passenger, by personnel of other carriers, and by travel agency personnel; (3) breakdowns or defects in communication, computing and other equipment used in processing reservations.

It is also apparent that the notice requirement of EDR-95 would not only have the effect of controlling the practice of deliberate overbooking. The effect of the notice would be to seriously curtail the practice. Thus, carriers would not overbook if they were required to advise passengers of their overbooked status twelve hours prior to flight time in view of the

resultant confusion, alarm, bitterness and cancellation of reservations. In this connection, it is to be noted that the table set forth above shows that there were a total of 1,728 overbookings and only 24 oversales or less than .0140 percent of overbookings. Had the requirement proposed in EDR-95 been in effect, it is manifest that a very sizeable number of persons would have been needlessly alarmed by the notification of their overbooked status and that reservations would have been canceled on flights which actually could have accommodated these passengers. Further, were the carrier prevented from overbooking, large numbers of passengers would be denied reservations on flights which, because of reservations turnover and "no-shows," would depart with empty seats.

In our view, any realistic appraisal of the practice of overbooking leads to the conclusion that, while it results in oversales, it also contributes to flexibility and freedom in securing, changing and cancelling reservations. Thus, any rigid controls over overbooking, as now practiced, would inevitably lead to restrictions on privileges which contribute greatly to the convenience of air transportation, and have come to be relied upon by the traveling public. In addition such controls would reduce load factors, and the additional cost would ultimately have to be borne by the traveling public.

In light of the above, it can be seen that the present reservations systems of the carriers in general benefit the traveling public. The

Board is not prepared, therefore, to require changes in these systems without fully exploring other means by which the oversales problem may be curbed. Moreover, the reservations practices of the carriers involve detailed methods of doing business, personnel supervision, use of equipment, adaptation to technological change, etc., requiring a high degree of management flexibility and freedom. Since these matters are within the special province and competence of carrier management, it is desirable that the Board attempt to minimize to the extent possible regulation of the details of the carriers' reservations systems. But by the same token, it is incumbent on the carriers themselves to take effective steps to curb oversales resulting from their reservations practices. Obviously, if efforts by the carriers in this direction are inadequate, the Board may be compelled to regulate these practices toward this end.

2. In connection with the foregoing, there are two reservations practices of carriers, in addition to overbooking, which contribute to oversales. First, are "free-sale" privileges, a reservations procedure established by agreement whereby the participating carrier can sell space on another carrier without any prior clearance or check of inventory up to a specific time before departure. This procedure is particularly used with respect to participating foreign carriers with offices located outside the United States. Second, are "block ticket" arrangements, by which persons which are given the ticket stock of a carrier can validate tickets which on their face purport to confirm reservations when in fact such reservations were not confirmed by the carrier.

"Free sale" and "block ticketing" no doubt reduce carrier reservations costs and increase flexibility and facility of securing reservations for the traveling public. Nevertheless, these practices not only contribute to oversales but they in fact invite oversales. This is an area over which the carriers have control, and the carriers have, in our judgment, a clear duty to take steps to drastically reduce the opportunities for oversales resulting from these practices. A recent resolution of ATC, 1/ is a measure toward this end which could and should be advanced further.

Similar observations can be made concerning the problem of "no-shows," which one carrier assigns as "the real problem" with respect to oversales. There may well be economic pressures on carriers to overbook in order to compensate for no-shows, as well as for reservations turnover. However, it is within the means of the carriers to reduce the number of no-shows through reservation service charges. The Board has expressed its belief in the desirability of reservation and no-show controls and previous

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1/ On April 20-21, 1966, the Air Traffic Conference of America adopted certain resolutions concerning Standard Interline Passenger Procedures to be effective June 3, 1966. One of these resolutions provides that carrier members shall not enter into free sales agreements on flight segments operating within the Continental United States, "when the selling offices have access to that Member's availibility by means of local or toll free telephone or manually maintained or computer stored availability." In addition the resolution provides that free sale shall not be granted to travel agents. (By Order E-24516, December 14, 1966, this resolution, and others designed to strengthen the carriers' reservations procedures, were approved.) However, the substantial number of free sale arrangements involving international flights remains unaffected by the resolution.

experiments with no-show penalty assessments have given graphic evidence of their salutary effect on the problem. 5/ However, no-show assessments were abandoned by the carriers and have not been in effect since January 31, 1963. Aside from causing serious economic loss to the carriers, the problem of no-shows results in substantial inconvenience to the traveling public in being denied reservations through the thoughtless action of those passengers who book more space than they intend to use. The carriers' failure to curb this practice is a matter of concern to the Board, and they are urged to take corrective steps such as the establishment of an appropriate reservations charge. 6/

3. It is apparent from the foregoing that the present reservations system of the carriers is designed to provide maximum benefits for the traveling public and to reduce the carriers' reservations costs. However, these ends are achieved at a price of substantial inconvenience and hardship to those relatively few passengers who are oversold and denied boarding although holding confirmed reservations. Our present determination not to attempt detailed control of reservations practices at this time is premised upon the carriers' effecting a substantial improvement in the treatment of oversold passengers.

In our judgment, the compensation provided in carriers' tariffs as liquidated damages for failure to accommodate passengers with confirmed

5/ See Order E-20859.
6/ The imposition of a charge should not, however, result in a higher fare level.

reserved space falls far short of being adequate. 7/ Data furnished by eleven trunk carriers show that for the twelve months ending August 31, 1965, of the 37,184 passengers denied confirmed space, 22,482 were qualified for denied boarding compensation. Of this total, 19,772 passengers actually accepted such compensation and received an average of only $20.00 per incident. Furthermore, we do not believe that the present denied boarding tariff is completely equitable, as it is primarily limited to domestic transportation.

In view of the above, it seems clear that the compensation provided in the tariff is inadequate to compensate passengers for the inconveniences

7/ These amounts are as follows:

Value of first remaining flight coupon for which space is confirmed on departed flight	Amount of Compensation
$1.05 - $5.00	Full value of the first remaining flight coupon $5.00
$5.05 - $10.00	50% of the value of the first remaining flight coupon $10.00
$10.05 - $80.00	
$80.05 and over	

arising from oversales. We cannot directly attack such causes of oversales as substitution of equipment or errors of personnel of the carriers[8] or their travel agents. With respect to the reservations practices of the carriers responsible for oversales, however, we conclude that these practices must either be regulated by the Board or that the denied boarding passengers be offered reasonable compensation. In other words, we shall permit the above-described reservations practices to continue without regulation on condition that the carriers file tariffs providing prompt, effective and adequate compensation to denied boarding passengers, as proposed herein.[9]

The proposed rule will require denied boarding tariffs to be filed by all carriers holding a certificate under section 401(d)(1) and (2) of the Act authorizing the transportation of persons, except a helicopter operator, or a carrier conducting intra-Alaska service exclusively.[10] The rule will apply to flights or portions of flights originating or terminating in the United States, its territories or possessions, but excludes flights originating and terminating within Alaska. The required tariffs will provide for compensation to eligible passengers at the rate of 200 percent of the value of the first remaining flight coupon with a $50.00

8/ With respect to human error, greater use of computerization offers opportunities for its reduction. The Board is gratified to note the great strides the industry has made and is making toward computerization of its reservations systems.

9/ Since comments on the supplementary proposal herein may govern the disposition of the 12-hour notice requirement proposed in EDR-95, we shall not withdraw the latter at this time.

10/ The latter are excluded because oversales have not been a problem with them.

minimum and a $200.00 maximum. The conditions under which passengers are eligible for compensation are set forth in the rule. The compensation, if accepted by a passenger, shall constitute liquidated damages for the carrier's failure to provide him with confirmed reserved space. The rule will require carriers to tender passengers eligible for denied boarding compensation, on the date and place the denied boarding occurs, a draft for the appropriate amount of compensation with the reverse side of the draft containing a waiver from liability. The carrier shall allow such passengers at least 30 days within which to endorse and cash the draft.

Carriers will be required to furnish passengers denied boarding a written statement explaining the terms, conditions and limitations of the denied boarding compensation.

4. In addition to providing reasonable compensation to denied boarding passengers, the proposed rule will require carriers to establish priority rules for determining which passengers holding confirmed reserved space shall be denied boarding on an oversold flight.

EDR-95 required that the priority rules be stated with "particularity and definiteness." The ATA and individual carrier comments interpret this language as requiring "inflexible" priority rules. It is pointed out that the carriers, individually, already have in their company manuals established guidelines for company personnel responsible for the accommodation of overbooked passengers. These guidelines, however, permit a degree of

flexibility in their application so that when it is necessary to deny boarding to a passenger, it is possible to consider all passenger service factors and thus choose the passenger who would be least inconvenienced by such denial and for whom alternative reservations are available.

In view of these comments, the proposed rule will not require inflexibility in the carriers' priority rules. It will require that the priority rules not result in unjust discrimination or undue or unreasonable prejudice or disadvantage to persons. Assuming that the "guidelines" in company manuals do not have the latter results, it appears that the carriers have substantially conformed to the requirements of the proposed rule.

In addition, EDR-95 proposed to amend Part 221 of the Economic Regulations by requiring carriers subject to Part 250 to file in their tariffs the criteria, rules and practices for determining which passengers with tickets for confirmed space on a specific scheduled flight are to be boarded on aircraft not able to accommodate all passengers with tickets for confirmed reserved space. The comment specifically addressed to the amendment of Part 221 is that priority rules reflecting flexibility are not proper tariff material. We agree that the flexibility required in the priority rules would make them inappropriate as tariff material. We shall, instead, require the carriers to file copies of their priority rules with the Board.

5. Finally, the proposed rule will require carriers to file reports regarding the number of unaccommodated passengers for specified markets, quarterly, and for their respective systems, monthly. The latter will be similar to reports submitted by carriers pursuant to Orders E-20859 and E-21187. Carrier comments submitted by the ATA, as well as individual carrier comments, have suggested the filing of such reports as an alternative to EDR-95. It has been the Board's experience in the administration of Part 234 of the Economic Regulations concerning realistic scheduling, that the reports required and the attendant publicity have created powerful incentives to improved performance in that area. We expect similar results through the reporting of unaccommodated passengers.

PROPOSED RULES

The Civil Aeronautics Board proposes to issue a new Part 250 (14 CFR 250) as follows:

PART 250 - PRIORITY RULES, DENIED BOARDING COMPENSATION TARIFFS AND REPORTS OF UNACCOMMODATED PASSENGERS

Sec.

250.1 Definitions.
250.2 Applicability.
250.3 Priority rules.
250.4 Filing of denied boarding compensation tariffs.
250.5 Amount of denied boarding compensation and exceptions.
250.6 Denied boarding compensation as liquidated damages.
250.7 Denied boarding compensation drafts.
250.8 Written explanation of denied boarding compensation.
250.9 Reports of unaccommodated passengers.

§250.1 Definitions.

For the purposes of this Part:

"Carrier" means an air carrier, except a helicopter operator or an air carrier conducting intra-Alaska service exclusively, holding a certificate issued by the Board pursuant to section 401(d)(1) and (2) of the Act, authorizing the transportation of persons.

"Confirmed reserved space" means space on a specific date and on a specific flight and class of service of a carrier which has been requested by a passenger and which the carrier or its agent has verified, by appropriate notation on the ticket, as being reserved for the accommodation of the passenger.

"Stopover" means a deliberate interruption of a journey by the passenger, agreed to in advance by the carrier, at a point between the place of departure and the place of destination.

"Value of the first remaining flight coupon" means the applicable one-way fare, including any surcharge, less any applicable discount.

§250.2 Applicability.

This part applies to all carriers as defined in §250.1 and applies to flights or portions of flights originating or terminating in the United States, its territories or possessions, but excludes flights originating and terminating within the State of Alaska.

§250.3 Priority rules.

Every carrier shall establish priority rules and criteria for determining which passengers holding confirmed reserved space shall be denied boarding on an oversold flight. Every carrier shall file with the Board two copies of such rules and criteria, including that portion of its company manual instructing employees on the order of boarding priorities in case of an oversold flight. Such rules and criteria shall not make, give or cause any undue or unreasonable preference or advantage to any particular person or subject any particular person to any unjust discrimination or any undue or unreasonable prejudice or disadvantage in any respect whatsoever.

§250.4 Filing of denied boarding compensation tariffs.

Every carrier shall file tariffs providing compensation to a passenger holding confirmed reserved space who presents himself for carriage at the appropriate time and place, having complied fully with the carrier's requirements as to ticketing, check-in and reconfirmation procedures and being acceptable for transportation under the carrier's tariff, and the flight for which the passenger holds confirmed reserved space is unable to accommodate the passenger and departs without him.

Note: See §221.38(a)(7), the tariff provision for filing denied boarding compensation tariffs.

§250.5 Amount of denied boarding compensation and exceptions.

The tariffs required by this part shall provide for compensation to be paid a passenger holding confirmed reserved space, as described in §250.4, at the rate of 200 percent of the value of the first remaining flight coupon with a $50.00 minimum and $200.00 maximum. Provided, however, that a passenger shall not be eligible for such compensation if:

(a) the flight for which the passenger holds confirmed reserved space is unable to accommodate him because of Government requisition of space;

(b) the carrier arranges for alternate means of transportation, which at the time such arrangement is made, is planned to arrive at the passenger's next point of stopover earlier than, or not later than one hour after, the time the flight, for which confirmed reserved space is held, is planned to arrive; or

(c) the passenger is accommodated on the flight for which he holds confirmed reserved space, but is offered accommodations or is seated in a section of the aircraft other than that specified in his ticket at no extra charge, provided that a passenger seated in a section for which a lower fare is charged shall be entitled to an appropriate refund.

§250.6 Denied boarding compensation as liquidated damages.

The tariffs required by this part shall specify that the carrier will tender, on the day and place the denied boarding occurs, compensation in the amount specified above, which, if accepted by the passenger, shall constitute liquidated damages for all damages incurred by the passenger as a result of the carrier's failure to provide the passenger with confirmed reserved space.

§250.7 Denied boarding compensation drafts.

Every carrier shall tender to a passenger eligible for denied boarding compensation, on the day and place the denied boarding occurs, a draft for the appropriate amount of compensation provided in §250.5, and the reverse side of such draft shall include a release stating that when the draft is endorsed by the passenger, the passenger thereby relieves the carrier from liability for all claims for damages which might accrue to the passenger as a result of the carrier's failure to provide the passenger with space on the flight in question, provided that the draft is endorsed and paid within 30 days of the date on which the denied boarding occurs.

§250.8 Written explanation of denied boarding compensation.

Every carrier shall furnish passengers who are denied boarding on flights on which they hold confirmed reserved space, immediately after the denied boarding occurs, a written statement explaining the terms, conditions and limitations of the denied boarding compensation provided by this part. Each carrier shall file three copies of the statement with the Bureau of Operating Rights, and the statement shall include the following language:

"Tariffs filed by this carrier with the Civil Aeronautics Board provide denied boarding compensation to a passenger holding confirmed reserved space where the flight for which the passenger holds such space is unable to accommodate him and departs without him.

"Passengers eligible for denied boarding compensation shall be compensated at the rate of 200 percent of the value of the first remaining

flight coupon on their tickets with a $50.00 minimum and $200.00 maximum. The carrier is required to tender to each such passenger, on the day and place the denied boarding occurs, a draft in the amount specified above which, if endorsed and paid within 30 days, shall relieve the carrier from liability for all claims for damages which might accrue to the passenger as a result of the carrier's failure to provide the passenger with space on the flight in question.

"In order to qualify for such compensation, a passenger must have complied fully with the carrier's requirements as to ticketing, check-in and reconfirmation procedures and be acceptable for transportation under the carrier's tariff. However, a passenger is not eligible for compensation if (a) the flight for which the passenger holds confirmed reserved space is unable to accommodate him because of Government requisition of space; (b) the carrier arranges for alternate means of transportation, which at the time such arrangement is made, is planned to arrive at the passenger's next point of stopover earlier than, or not later than one hour after, the time the flight, for which confirmed reserved space is held, is planned to arrive; or (c) the passenger is accommodated on the flight for which he holds confirmed reserved space, but is offered accommodations or is seated in a section of the aircraft other than that specified in his ticket at no extra charge, Provided, that a passenger seated in a section for which a lower fare is charged shall be entitled to an appropriate refund."

§250.9 Reports of unaccommodated passengers.

Carriers shall file reports, in the form attached hereto as Appendix A, with respect to the applicable markets specified hereafter, of the total number of revenue passengers boarded and the number of unaccommodated passengers in three categories: denied boarding on aircraft, downgrades, and upgrades. The markets for which such reports shall be filed are those for which on-time reporting is filed in accordance with Part 234 of the Board's Economic Regulations and, in addition, New York-San Juan and Los Angeles/San Francisco-Honolulu. Local service carriers shall, in addition to reports which may be required by Part 234, file such data for the five top-ranking markets of each. The reports shall cover the third month in each calendar quarter and shall be filed within 45 days after the month covered by the report. In addition, carriers shall file, on a monthly basis, the information requested in Appendix B. These reports may be on a system basis or limited to those stations accounting for 67 percent of the carrier's total enplanements, or the top 15 stations, whichever number is greater. The information in Item 4 shall be limited to the passengers enplaned at the reported stations and not the system total. Further, a list of the stations included should be appended to each report. These reports are to be submitted by the 30th of the month following each monthly reporting period. Those carriers with both domestic and international operations shall file separate reports for each.

The Civil Aeronautics Board also proposes to amend Part 221 of the Economic Regulations (14 CFR Part 221) as follows:

By amending §221.38(a) by adding a new paragraph (7) as follows:

§221.38 Rules and regulations.

(a) Contents

* * * * *

(7) Denied boarding compensation. For carriers subject to Part 250, denied boarding compensation as specified in Part 250.

Appendix A

UNACCOMMODATED PASSENGER REPORT

Carrier _____ Denied Boardings 1/ _____, 19__

City Pairs (Nr Direction)	Qualified for Compensation	Exceptions per Tariff Rule 2/	Nonresident	Unresident	Total Enplaned Passengers

Note: Carriers will report only nonstop flights on this form.

1/ Number of passengers denied space on flights for which they held a valid ticket.

2/ a. Government requisition of space; b. arrangement for alternate means of transportation for passenger which, at the time such arrangement was made, was planned to arrive at the passenger's next point of stop-over not later than one hour after the time of the flight, for which confirmed reserved space was held, was planned to arrive; c. passenger accommodation on the flight for which he held confirmed reserved space, but was seated in a section of the aircraft other than that specified by the ticket.

Appendix B

CIVIL AERONAUTICS BOARD
WASHINGTON, D. C.

REPORT OF PASSENGERS DENIED CONFIRMED SPACE

TO BE FILED WITHIN 30 DAYS AFTER TERMINATION OF EACH MONTH

Carrier _____ Month of _____, 196_

		No. of Passengers
1. Passengers who received compensation in accordance with Rule , or Rule of Agent C. C. Squire's CAB No. or subsequent similar tariff rule		
2. Passengers who qualified for compensation in accordance with Rule , or Rule (3) of Agent C. C. Squire's CAB No. but did not accept or were not offered compensation under such, or subsequent similar tariff rule		
3. Passengers who did not receive compensation in accordance with provisions for exceptions contained in Rule , or Rules (3) of Agent C. C. Squire's CAB No. or subsequent similar tariff rule:		XXXXXXXXXXXXX
a) government requisition of space		
b) arrangement for alternate means of transportation for passenger which, at the time such arrangement was made, was planned to arrive at the passenger's next point of stop-over not later than one hour after the time of the flight, for which confirmed reserved space was held, was planned to arrive		
c) passenger accommodation on the flight for which he held confirmed reserved space, but was seated in a section of the aircraft other than that specified on his ticket	Upgrade	
	Downgrade	
	Total 1/	
4. Number of passengers enplaned		

1/ Total would include all passengers denied confirmed space during the reporting period--include appropriate notes in the event that the sum of the specific items listed does not agree with the total.

NOTE: Any abnormal condition, such as strikes which have a bearing upon the results during the reporting period should be noted.

DEFENDANT'S EXHIBIT E – CAB REGULATION ER-503

UNITED STATES OF AMERICA
CIVIL AERONAUTICS BOARD
WASHINGTON, D. C.

Economic Regulations
Enactment of Part 250
Effective: October 17, 1967
Adopted: August 3, 1967

PART 250 - PRIORITY RULES, DENIED BOARDING COMPENSATION TARIFFS AND REPORTS OF UNACCOMMODATED PASSENGERS

In a Notice of Proposed Rule Making published in the Federal Register on January 17, 1967 (32 F.R. 459) and circulated as EDR-109, Docket 16563, the Board proposed to amend Part 221 and to issue a new Part 250 of the Economic Regulations. The new part would require carriers to establish and file with the Board priority rules for determining which passengers holding confirmed reserved space shall be denied boarding on an oversold flight. In addition, the amendment to Part 221 and the new Part 250 would require carriers to file tariffs providing specified denied boarding compensation to such passengers. Finally, the new part would require carriers to file reports of unaccommodated passengers.

Interested persons were offered an opportunity by the Notice to participate in the making of this rule through submission of written data, views or arguments. Consolidated comments on behalf of 28 air carriers have been submitted by the Air Transport Association of America (ATA). In addition, supplementary comments have been filed by certain air carriers, 1/

1/ Eastern Air Lines, Lake Central Airlines, Mohawk Airlines, Northwest Airlines, Pan American World Airways, Trans Caribbean Airways, Trans-Texas Airways, Trans World Airlines and United Air Lines.

Exhibit E

and a number of comments have been received from members of the traveling public. Due consideration has been given to all relevant matter presented.

The Board has decided to adopt the rule with the modifications set forth below. Except as modified herein, the tentative findings set forth in the Explanatory Statement to the proposed rule (EDR-109, supra) are incorporated herein by reference and made final.

In considering the comments filed by ATA and supplementary comments filed by various air carriers, we are met at the outset with the contention that certain aspects of the proposed rule are beyond the scope of the Board's statutory authority. Specifically, the carriers claim that the Board's power to regulate denied boarding compensation derives solely from section 1002 of the Act. It is asserted that under sections 1002(d) and (f) the Board can prescribe a rule, regulation or practice affecting a rate, fare or charge for interstate, overseas, or foreign air transportation, or the value of service thereunder, only if the Board, after notice and hearing, finds the present rule, regulation or practice unlawful. Since no hearing has been held, it is argued that we cannot prescribe denied boarding compensation.

We do not agree. The fact that denied boarding compensation is the subject of tariff filings does not compel us to act only pursuant to the tariff and rate-fixing procedures of the Act. While tariff procedures undoubtedly are available and represent a convenient and logical method for setting forth the practices which the carriers follow with respect to reservations and denied boarding compensation, we would be empowered, in our judgment, to impose the requirements here involved by regulation which did not

require the filing of tariffs. Furthermore, while the rate-fixing procedures of the Act also are available and appropriate for dealing with specific problems peculiar to individual carriers in relation to such practices, the problems with which we are here confronted go beyond the mere regulation of rates and practices affecting the value of services. We are here concerned with the broad problem of air carrier reservation procedures, including circumstances in which the carriers are utilizing a system of confirmed reservations notwithstanding their inability to assure that such reservations will in fact be honored. The problem thus cuts across a number of areas of Board jurisdiction and carrier responsibility, and the provisions and purposes of Section 411 of the Act are involved to a far greater extent than are the rate-fixing ones. Section 411 precludes "unfair or deceptive practices or unfair methods of competition in air transportation or the sale thereof." This provision, the anti-discrimination provision, and the over-all public interest provisions and purposes of the Act militate against a reservation system which leads members of the traveling public to believe that they have firm reservations when in fact they do not, without there being some adequate compensation features available to those persons whose reservations are not honored. The Board is not required to sit idly by and permit such a result. Neither does it believe that it is required to proceed by cumbersome evidentiary hearings to take the action here involved, particularly since the issues and action involved are largely ones of policy and judgment in future applications whose resolution does not turn upon findings of fact concerning

disputed evidentiary matters. Nor is this result legally required because tariffs are involved. See American Airlines v. Civil Aeronautics Board, 359 F. 2d 624 (C.A.D.C., 1966), cert. denied, 385 U.S. 843.

Congress has given the Board not only a wide regulatory authority with respect to carrier practices, but the specific function of promoting adequate, economical, and efficient service by air carriers at reasonable charges, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices. And, in addition, Congress has given the Board the power to classify carriers and service and the power to issue implementing rules and regulations. 2/ See American Airlines v. Civil Aeronautics Board, supra. On the other hand, the carriers have the duty, under section 404(a), to enforce just and reasonable classifications, rules, regulations and practices relating to interstate and overseas air transportation, and section 404(b) proscribes unjust discrimination.

In our opinion the action proposed is clearly within our rule making powers under sections 204(a) and 416(a). We are here basically concerned

2/ Section 204(a) provides: "The Board is empowered to perform such acts, to conduct such investigations, to issue and amend such orders, and to make and amend such general or special rules, regulations, and procedure, pursuant to and consistent with the provisions of this Act, as it shall deem necessary to carry out the provisions of, and to exercise and perform its powers and duties under this Act."

Section 416(a) provides: "The Board may from time to time establish such just and reasonable classifications or groups of air carriers for the purposes of this title as the nature of the services performed by such air carriers shall require; and such just and reasonable rules and regulations, pursuant to and consistent with the provisions of this title, to be observed by each such class or group, as the Board finds necessary in the public interest."

with the policy the Board should adopt with respect to the reservations practices of route carriers which operate flights to and from the contiguous States. Thus, unlike adjudication, we are not evaluating a respondent's past conduct or determining past and present rights and liabilities, and the issues do not relate to evidentiary facts, but to policy-making conclusions to be drawn from the facts.

The facts to which our policy is directed have been set out in EDR-109. There, we noted the dimensions of the oversales problem and the reservations practices of the carriers which contribute to it. It was concluded that the present reservations system of the carriers is designed to provide maximum benefits to the traveling public and to reduce the carriers' reservations costs. However, it was concluded that these ends are achieved at a price of substantial inconvenience and hardship to those relatively few passengers who are oversold and denied boarding although holding confirmed reservations. Under these circumstances two policy avenues were open to the Board. It could reduce oversales by closely regulating the details of the reservations systems of the carriers with the inevitable result of curtailing the present flexibility by which passengers make, change and cancel reservations. No carrier suggests that this course should be taken by the Board, and several comments state that the present proposal is preferable to our earlier proposal which would have placed severe restrictions on existing reservations practices. 3/

3/ EDR-95, October 12, 1965.

The second policy course is that which has been followed: to take positive steps to assure prompt, effective and adequate compensation to passengers who are denied boarding and to refrain from detailed regulation of the carriers' reservations practices. Clearly, commensurate with our responsibilities, a third policy avenue was not open: to do nothing. Certainly we cannot properly tolerate a system which represents to the public a commitment that a passenger has a firm reservation when that commitment is not honored upwards of 50,000 times a year and the passengers holding these unhonored reservations are offered little or no compensation.

We further emphasize that the facts upon which our policy is based are not contested nor are there any issues involved which are of a type which could be resolved in an evidentiary hearing. And in this connection we point out that neither ATA nor any carrier has stated what kinds of facts they propose to adduce at an oral hearing, and by what witnesses, nor is there any proffer as to particular lines of cross-examination which required explanation at an oral hearing. 4/

Moreover, there has been no refutation of the Board's findings in EDR-109 that the compensation provided in carriers' present tariffs for failure to accommodate passengers with confirmed reserved space "falls far short of beirg adequate" 5/ and that it is not completely equitable in view

4/ See American Airlines, Inc. v. Civil Aeronautics Board, supra, 359 F. 2d at 633.
5/ Eastern specifically agrees with this finding.

of its being primarily limited to domestic transportation. Thus, ATA does not claim that the existing tariff is adequate. Instead, it claims that the objective of "prompt, effective and adequate compensation to oversold passengers" is accomplished "under existing rules and practices." (Underscoring added.) The "practices" referred to, 6/ however, vary from carrier to carrier, are conducted on an ad hoc basis depending upon the situation, and are not obligatory. We cannot accept the voluntary provision of amenities by air carriers to some oversold passengers as a substitute for requiring air carriers to offer prompt, effective and adequate monetary compensation to all oversold passengers. 7/

In their separate comments, the only carriers which appear to defend the present level of the denied boarding compensation tariff are TWA and United. TWA believes that, although the statistics show that those accepting denied boarding compensation received only an average of $20.00, "it can be argued equally well from these statistics that the vast majority of oversale passengers deemed the existing compensation to be adequate" and United states that from all the evidence the Board has before it, "it could equally as well conclude that the oversold passenger has been compensated too handsomely."

6/ ATA states that "the carriers generally absorb the costs of such amenities as overnight hotel accommodation in those rare instances where the oversold passenger cannot be boarded until the next day, local and long distance phone calls or telegrams to advise of changed arrival time, meals, ground transportation, and even the chartering of air taxi planes to facilitate movement of the passenger." ATA adds: "For representative carriers the annual costs of such amenities approximate the amounts paid out as denied boarding compensation."
7/ On the other hand, the requirement that carriers provide denied boarding compensation to oversold passengers is not intended to preclude carriers from according these amenities to passengers.

We cannot agree. An average payment of $20.00 for a carrier's failure to provide a passenger with confirmed reserved space is, on its face, a mere token which cannot reasonably be considered adequate to compensate a passenger for the inconvenience, distress, and, in many cases, hardship and monetary loss resulting from an oversale. And clearly no inference can be drawn from the fact that passengers in the main accept what is offered to them rather than engage in costly litigation with the carrier.

For the reasons set forth, we conclude that it is within the Board's rule making powers to require carriers to file denied boarding compensation tariffs at a level prescribed by the Board, as well as to require the filing of priority rules and reports of unaccommodated passengers. We further conclude that the rule as proposed, except for the modifications hereinafter set forth, is necessary to give effect to the Board's policy that air carriers conducting flights to and from the contiguous States shall be required to offer prompt, effective and adequate compensation to oversold passengers.

We have, however, given careful consideration to the views of the carriers and the public as submitted in their comments on EDR-109 concerning implementation of our policy. Set forth below is our disposition of the significant matters raised.

We deal first with the suggestion of Northwest, Pan American and TWA that the rule should not apply to international routes.[8/] These carriers argue that, since foreign air carriers do not offer denied boarding compensation, U.S. flag carriers would be at a competitive disadvantage if they were required to do so. And TWA states that, if the Board wishes to consider denied boarding compensation in international air transportation at all, then it should consider such only with a view to equal treatment of United States and foreign flag carriers.[9/]

In our view, the above comments do not justify excepting foreign air transportation by U.S. air carriers from application of the requirement to provide adequate compensation to oversold passengers. Far from being a competitive disadvantage, it would appear to us that if U.S. flag carriers do provide denied boarding compensation and their foreign competitors do not, the competitive disadvantage lies with the latter. Furthermore, once U.S. flag carriers are known to provide denied boarding compensation and foreign

8/ Trans Caribbean requests that the New York-San Juan market also be excluded from the provisions of the rule until such time as "more realistic" provisions can be worked out to cure the related problems in the market. In support, it relies on extreme peaking problems and a high level of no-shows and multiple bookings during peak times. Far from furnishing a reason for excluding the New York-San Juan market, the matters cited by Trans Caribbean illustrate that this is a market where the oversales problem is particularly acute and the rule needed. Furthermore, no-shows and multiple bookings are within the capacity of the carrier to control.

9/ TWA also contends that the rule would require modification of various IATA resolutions, particularly Resolution 278, and that the Board should take this factor into account. We are not convinced that modification of any IATA resolution would be required. But if such were the case, it would pose no obstacle to promulgation of the rule.

air carriers do not, competitive pressures may well force the latter to provide equal or substantially equal treatment to oversold passengers. Finally, the per carrier expense of denied boarding payments has not been shown, or even alleged, to be of such magnitude as to affect the relative operating costs of U.S. flag carriers vis-à-vis their foreign competitors.

In this latter connection we point out that the cost of denied boarding compensation to the carriers as a whole will be of relatively minor proportion. In 1966, according to ATA, the domestic trunk and local service airlines boarded some 95 million passengers, and the estimated 50,000 oversold passengers represented only 5/100ths of one percent of the passengers boarded. It is clear that we are dealing with a minimal cost item relative to total revenues.

Turning to other aspects of the rule, it was proposed that the required tariffs provide for compensation to be paid a passenger holding confirmed reserved space at the rate of 200 percent of the value of the first remaining flight coupon with a $50.00 minimum and a $200.00 maximum. ATA and carriers commenting on the level of compensation are unanimously of the belief that it is excessive. ATA states, however, that it may well be that a case can be made for a rate in the range of 100 percent of the fare with no maximum for flights within the Continental United States, and maintains that the proposed $50.00 minimum would be particularly harsh on local service carriers. Eastern opposes the $50.00 minimum, and asserts that 100 percent of the value of the first remaining flight coupon with a

$25.00 minimum and a $200.00 maximum, plus full amenities where warranted, is a more realistic level.[10] Northwest argues that if such a requirement is imposed on foreign air transportation, the maximum should not be more than $100.00, and TWA believes that an international oversale "penalty" should not in any event exceed 50 percent of the first remaining flight coupon and that a maximum limit of $150.00 would be more than equitable.[11]

The level of compensation to be provided oversold passengers must be determined on the basis of reasonable and responsible judgment in the light of comment offered on the proposal and the attendant facts of record. On balance we are persuaded that the appropriate level of compensation would be 100 percent of the first remaining flight coupon with a maximum of $200 and a minimum of $25.00.

Compensation at the rate of 100 percent of the value of the first remaining flight coupon, as suggested by ATA and certain carriers, is equal to the amount invested by the passenger and represents the value of the transportation which the carrier failed to provide under its commitment to the passenger. Therefore, we believe that this level would in a general way make the passenger "whole" for the damage suffered by him, would be high enough, in our view, to provide adequate compensation to passengers accepting it and still not be so high as to invite abuses by some passengers.

10/ Mohawk also supports compensation at the rate of 100 percent of the first remaining flight coupon with a $25.00 minimum.

11/ TWA advocates a domestic "penalty" of 100 percent of the first remaining coupon and a $150.00 maximum.

While Eastern agrees that a $200.00 maximum would be appropriate, Northwest and TWA oppose this maximum for international travel.[12] The latter argues that the maximum, as well as the percentage rate, for international travel should be below domestic standards, as the inconvenience tends to be less for international travelers.

We agree that delays for international travelers are of generally less significance than for domestic travelers. Because of the length of transit, time differentials, customs clearance requirements, and extended stays abroad which are usual in international travel, these travelers ordinarily do not budget their time so tightly as in the case of domestic travelers, and a delay of a few hours occasioned by denied boarding would not cause undue hardship. We shall recognize these differences in international travel by revising the proposed rule to provide that, in foreign air transportation a passenger shall not be eligible for compensation if the carrier arranges for alternate means of transportation, which, at the time such arrangement is made, is planned to arrive at the passenger's next point of stopover earlier than, or not later than four hours after, the time the flight, for which confirmed reserved space is held, is planned to arrive. In view of this revision, there is no justification for

12/ In addition, Pan American believes that the temptation to fraud inherent in a proposal that would pay $200.00 to a passenger with a ticket showing a confirmed reservation for which no record could be located would be greater in foreign air transportation because of the greater value in many countries of $200.00 in United States currency.

compensating eligible denied boarding passengers in foreign air transportation at a lower level than domestic passengers.

With respect to the proposed $50.00 minimum, it is contended that it would be particularly harsh on local service carriers and on trunklines with respect to short-hauls, since it could result in payments up to 500 percent of the fare in principal local service markets and over 300 percent in certain short-haul trunk markets.

In light of these comments we have decided to revise the minimum to $25.00. Under this minimum, payments of more than 200 percent of the flight coupon will result only where its value is less than $12.50. At the same time a $25.00 minimum gives recognition to the fact that compensation directly geared to the value of a flight coupon in this limited category would not be adequate.

As indicated above, in international travel the "one-hour rule" respecting arrangement of alternate means of transportation to passengers will be revised to four hours. In addition, the final rule will provide that, with respect to interstate and overseas air transportation, a passenger shall not be eligible for compensation if the carrier arranges for alternate means of transportation, which, at the time such arrangement is made, is planned to arrive at the passenger's next point of stopover, earlier or not later than two hours after, the time the flight, for which confirmed reserved space is held, is planned to arrive.

In our opinion the proposed one-hour rule would be too restrictive. As a practical matter there would be relatively few opportunities for carriers to provide alternate transportation under these conditions. A two-hour

provision will give the carriers flexibility in arranging alternate transportation for the passengers' benefit and a two-hour delay at a stopover point should not, in general, cause undue inconvenience to passengers. Furthermore, ATA points out that where a passenger must make a connection with another flight requiring for example a two-hour stopover, if the carrier arranges alternate transportation which would permit him to make the connection he would not be inconvenienced. Nevertheless, despite the lack of inconvenience to the passenger, he would be eligible for compensation under a one-hour rule if the alternate flight reached the stopover point more than one hour after the planned arrival of the flight on which he had been originally booked. For the above reasons, the proposed rule will be revised in the manner indicated.

The proposed rule did not provide an exception for eligibility for denied boarding compensation where the flight on which the passenger holds confirmed reserved space is unable to accommodate him because of (1) extraordinary fuel requirements, (2) reduction in allowable takeoff or landing weight for reasons beyond the carrier's control, or (3) substitution of equipment of lesser capacity when required by operational and/or safety reasons. These exceptions are contained in the carriers' present denied

boarding compensation tariff, and ATA, TWA, Trans Caribbean and Trans-Texas contend that the rule should include them.[13/] ATA believes that to require the payment of denied boarding compensation under the three situations described above would be a retrograde step not in the public interest. ATA states that the practicalities of air transportation sometimes make the aircraft scheduled for a particular flight unavailable for such reasons as mechanical problems or because it is grounded by weather at some other airport. When this occurs, and the only available airplane is one of smaller capacity, ATA contends that it is in the public interest to substitute the smaller airplane, and carry as many passengers as it will accommodate rather than to cancel the flight, and the same considerations apply where it is necessary to block seats because of weather or fuel requirements.

We have determined to revise the rule only to provide an exception for the case of substitution of equipment of lesser capacity when required by operational and/or safety reasons.

While the carriers cannot predict that circumstances on a particular flight will require the blocking of seats because of weather or fuel requirements, they can predict that such conditions will arise from time to time, particularly at certain stations. By accepting reservations up to 100 percent of the seats on the aircraft, the carriers in effect gamble that these circumstances will not occur on a particular flight. This policy, which is under the control of the carriers, inevitably produces oversales. Such oversales, moreover, could be substantially eliminated by accepting

13/ Eastern, however, endorses the deletion of these exceptions.

reservations for something less than the total number of seats. While the present policy may well be the most economic, we see no reason why it should in effect be subsidized by the oversold passenger. We shall not, therefore, adopt the first two exceptions suggested above.

The exception with respect to substitution of equipment does, however, have merit. While the blocking of space to reduce takeoff weight to an allowable level would normally affect comparatively few passengers on any given flight, the substitution of equipment of lesser capacity because of mechanical failure, for example, may require a large number of passengers to be denied boarding with a consequent substantial loss to the carrier were it required to pay denied boarding compensation. Further, unlike the case of payload restrictions, denied boardings arising from aircraft substitutions are more truly beyond the carriers' control, since they could not reasonably be expected to withhold from advance sale the very large number of seats that would be required to reasonably insure against the possibility of oversales. Also, in the case of equipment substitutions, economic pressures might well force the carrier to cancel the flight altogether rather than pay compensation to passengers denied boarding because of the substitution. Accordingly, we believe that it would be in the general interest of the traveling public to permit this exception to eligibility for denied boarding compensation. We shall be prepared, however, to eliminate this exception should we find that abuses have occurred.

Section 250.7 of the proposed rule[13a/] would require every carrier to tender a passenger eligible for denied boarding compensation, on the day and place the denied boarding occurs, a draft for the appropriate amount of compensation, with the reverse side of the draft including a release from liability when the draft is endorsed by the passenger, provided that the draft is endorsed and paid within 30 days of the date on which the denied boarding occurs. ATA objects to the requirement of release from liability if the draft is endorsed and paid within 30 days. It states that most carriers regard the existing tariff which "contemplates"[14/] the transaction being completed at the time of denied boarding as a cleaner and more expeditious way to handle oversale incidents. TWA and Trans Caribbean also oppose the 30-day period, while Eastern believes it reasonable. And Mohawk does not oppose it, but states that it will petition for relief if at some later date it finds such time lag to be burdensome.

In our opinion, it would be manifestly unfair to require passengers to make a decision, immediately after being denied boarding, as to whether to accept compensation as liquidated damages for all damages incurred by the passenger as a result of the carrier's failure to provide the passenger with confirmed reserved space. Passengers who are denied boarding should instead be given the opportunity of making the election after the consequences of denied boarding have occurred and are known to them. We believe

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13a/ Sections 250.7, 250.8 and 250.9 of the proposed rule referred to herein are recodified in the final rule as 250.8, 250.9 and 250.10, respectively.

14/ There is no time limit specified in the existing tariff.

the 30-day limit will insure this result without undue delay in settling the incident.

In addition to the comments noted above, ATA states, with respect to the requirement that tender of the draft be made at the time and place the denied boarding occurs, that in some situations it has been found that it better suits the passenger's convenience if this is done at the point of destination.[15/] (For example, even the few minutes required to complete the compensation transaction might cause the passenger to miss, or to risk missing, an alternative flight.) According to ATA, some carriers feel a minor rewording of the present rule may be in order to cover such situations.

We agree with ATA that where a carrier arranges alternate means of transportation for an oversold passenger it may be impossible to prepare and tender the draft prior to departure time. Accordingly, the rule will be changed by adding a proviso that where a carrier arranges, for the passenger's convenience, alternate means of transportation which departs before the draft can be prepared and tendered the passenger, tender shall be made by mail or other means within 24 hours after the time the denied boarding occurs.

In addition, Trans Caribbean states that the rule raises substantial questions of administration, since it is not always possible for ticket

15/ It is noted, however, that the point of destination could well be a station not served by the carrier required to make the tender.

counter personnel to tell whether a passenger holding an apparently valid ticket but whose name is not on the reservation list actually holds a valid confirmed reservation. According to the carrier, the most common example of this problem is the returning passenger who has not reconfirmed his reservation.

We find that Trans Caribbean's contention is without substantial merit. Section 250.4 of the rule specifies that denied boarding compensation tariffs apply "to a passenger holding confirmed reserved space who presents himself for carriage at the appropriate time and place, having complied fully with the carrier's requirements as to ticketing, check-in and reconfirmation procedures and being acceptable for transportation under the carrier's tariff * * *." We note that Trans Caribbean is the only carrier mentioning the problem referred to, and we are not persuaded that it is not within the control of the carrier.

Section 250.8 of the proposed rule provides that every carrier shall furnish passengers who are denied boarding, immediately after the denied boarding occurs, a written statement explaining the terms, conditions and limitations of the denied boarding compensation. Such a statement was to have included certain specified language. AIA, Eastern and TWA contend that the specified language is lengthy and somewhat confusing.

We have decided to accord to the carriers the option of using a statement containing the prescribed language or of using a statement of their own making, provided that it includes the substance of the prescribed

language and it is submitted to and approved by the Board prior to its use. Concurrently with the issuance of the instant rule, we are issuing a final rule amending Part 385 by delegating to the Director, Bureau of Operating Rights, the authority to approve or disapprove the statement.

Finally, section 250.9 of the proposed rule would require carriers to file with the Board reports of unaccommodated passengers. ATA and TWA, while otherwise not objecting to the proposal, take the position that reports by U.S. flag carriers in competitive markets with foreign flag carriers should be withheld from public disclosure. We agree, and the final rule will provide that reports filed covering international services shall be withheld from public disclosure. Disclosure of such information would adversely affect the interest of these carriers, since it would enable foreign air carriers to have access to it for competitive reasons, and disclosure is not required in the interest of the public.

Accordingly, the Civil Aeronautics Board hereby amends the Economic Regulations, effective October 17, 1967, by adding a new Part 250 to read as follows:

PART 250 - PRIORITY RULES, DENIED BOARDING COMPENSATION TARIFFS AND REPORTS OF UNACCOMMODATED PASSENGERS

Sec.

250.1 Definitions.
250.2 Applicability.
250.3 Priority rules.
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250.5 Amount of denied boarding compensation.
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250.7 Denied boarding compensation as liquidated damages.
250.8 Denied boarding compensation drafts.
250.9 Written explanation of denied boarding compensation.
250.10 Reports of unaccommodated passengers.
Appendix A
Appendix B

§250.1 Definitions.

For the purpose of this part:

"Carrier" means an air carrier, except a helicopter operator or an air carrier conducting intra-Alaska service exclusively, holding a certificate issued by the Board pursuant to section 401(d)(1) and (2) of the Act, authorizing the transportation of persons.

"Confirmed reserved space" means space on a specific date and on a specific flight and class of service of a carrier which has been requested by a passenger and which the carrier or its agent has verified, by appropriate notation on the ticket, as being reserved for the accommodation of the passenger.

"Stopover" means a deliberate interruption of a journey by the passenger, agreed to in advance by the carrier, at a point between the place of departure and the place of destination.

"Value of the first remaining flight coupon" means the applicable one-way fare, including any surcharge, less any applicable discount.

§250.2 Applicability.

This part applies to all carriers as defined in §250.1 and applies to flights or portions of flights originating or terminating in the United States, its territories or possessions, but excludes flights originating and terminating within the State of Alaska.

§250.3 Priority rules.

Every carrier shall establish priority rules and criteria for determining which passengers holding confirmed reserved space shall be denied boarding on an oversold flight. Every carrier shall file with the Board

two copies of such rules and criteria, including that portion of its company manual instructing employees on the order of boarding priorities in case of an oversold flight. Such rules and criteria shall not make, give or cause any undue or unreasonable preference or advantage to any particular person or subject any particular person to any unjust discrimination of any undue or unreasonable prejudice or disadvantage in any respect whatsoever.

§250.4 Filing of denied boarding compensation tariffs.

Subject to the exceptions provided in §250.6, every carrier shall file tariffs providing compensation to a passenger holding confirmed reserved space who presents himself for carriage at the appropriate time and place, having complied fully with the carrier's requirements as to ticketing, check-in and reconfirmation procedures and being acceptable for transportation under the carrier's tariff, and the flight for which the passenger holds confirmed reserved space is unable to accommodate the passenger and departs without him.

Note: See §221.38(a)(7).

§250.5 Amount of denied boarding compensation.

Subject to the exceptions provided in §250.6, the tariffs required by this part shall provide for compensation to be paid a passenger holding confirmed reserved space, as described in §250.4, at the rate of 100 percent of the value of the first remaining flight coupon with a $25.00 minimum and a $200.00 maximum.

§250.6 Exceptions to eligibility for denied boarding compensation.

A passenger shall not be eligible for denied boarding compensation if:

(a) The flight for which the passenger holds confirmed reserved space is unable to accommodate him because of: (1) Government requisition of space; or (2) substitution of equipment of lesser capacity when required by operational and/or safety reasons; or

(b) The carrier arranges for alternate means of transportation, which, at the time such arrangement is made, is planned to arrive at the passenger's next point of stopover earlier than, or not later than two hours after, the time the flight, for which confirmed reserved space is held, is planned to arrive in the case of interstate and overseas air transportation, or four hours after such time in the case of foreign air transportation; or

(c) The passenger is accommodated on the flight for which he holds confirmed reserved space, but is offered accommodations or is seated in a section of the aircraft other than that specified in his ticket at no extra charge: Provided, That a passenger seated in a section for which a lower fare is charged shall be entitled to an appropriate refund.

§250.7 Denied boarding compensation as liquidated damages.

The tariffs required by this part shall specify that the carrier will tender, on the day and place the denied boarding occurs, compensation in the amount specified above, which, if accepted by the passenger, shall constitute liquidated damages for all damages incurred by the passenger as a result of the carrier's failure to provide the passenger with confirmed reserved space.

§250.8 Denied boarding compensation drafts.

Every carrier shall tender to a passenger eligible for denied boarding compensation, on the day and place the denied boarding occurs, a draft for the appropriate amount of compensation provided in §250.5, and the reverse side of such draft shall include a release stating that when the draft is endorsed by the passenger, the passenger thereby relieves the carrier from liability for all claims for damages which might accrue to the passenger as a result of the carrier's failure to provide the passenger with space on the flight in question, provided that the draft is endorsed and paid within 30 days of the date on which the denied boarding occurs: Provided, however, That where a carrier arranges, for the passenger's convenience, alternate means of transportation which departs before the draft can be prepared and tendered the passenger, tender shall be made by mail or other means within 24 hours after the time the denied boarding occurs.

§250.9 Written explanation of denied boarding compensation.

Every carrier shall furnish passengers who are denied boarding on flights on which they hold confirmed reserved space, immediately after the denied boarding occurs, a written statement explaining the terms, conditions and limitations of the denied boarding compensation provided by this part. Each carrier shall, prior to the effective date of this rule, file three copies of the statement with the Bureau of Operating Rights, and the statement shall include the language hereinafter set forth: Provided, however, That where a carrier desires to use a statement of its own making which contains the substance of the following language, it may do so after it has submitted the statement to the Board and the Board has approved it.

"Tariffs filed by this carrier with the Civil Aeronautics Board provide denied boarding compensation to a passenger holding confirmed reserved space where the flight for which the passenger holds such space is unable to accommodate him and departs without him.

"Passengers eligible for denied boarding compensation shall be compensated at the rate of 100 percent of the value of the first remaining flight coupon on their tickets with a $200.00 maximum and a $25.00 minimum. The carrier is required to tender to each such passenger, on the day and place the denied boarding occurs, a draft in the amount specified above which, if endorsed and paid within 30 days, shall relieve the carrier from liability for all claims for damages which might accrue to the passenger as a result of the carrier's failure to provide the passenger with space on the flight in question. Where, however, the carrier arranges, for the passenger's convenience, alternate means of transportation which departs before the draft can be prepared and tendered the passenger, tender will be made by mail or other means, within 24 hours after the time the denied boarding occurs.

"In order to qualify for such compensation, a passenger must have complied fully with the carrier's requirements as to ticketing, check-in and reconfirmation procedures and be acceptable for transportation under the carrier's tariff. However, a passenger is not eligible for compensation if (a) the flight for which the passenger holds confirmed reserved

space is unable to accommodate him because of Government requisition of space or substitution of equipment of lesser capacity for operational and/or safety reasons; (b) the carrier arranges for alternate means of transportation, which, at the time such arrangement is made, is planned to arrive at the passenger's next point of stopover earlier than, or not later than two hours after, the time the flight, for which confirmed reserved space is held, is planned to arrive in the case of interstate and overseas transportation, or four hours after such time in the case of foreign air transportation; or (c) the passenger is accommodated on the flight for which he holds confirmed reserved space, but is offered accommodations or is seated in a section of the aircraft other than that specified in his ticket at no extra charge: Provided, That a passenger seated in a section for which a lower fare is charged shall be entitled to an appropriate refund."

§250.10 Reports of unaccommodated passengers.

Carriers shall file reports with the Bureau of Accounts and Statistics, in the form attached hereto as Appendix A (CAB Form 250), with respect to the applicable markets specified hereinafter, of the total number of revenue passengers boarded and the number of unaccommodated passengers in three categories: denied boarding on aircraft, downgrades and upgrades. The markets for which such reports shall be filed are those for which on-time reporting is filed in accordance with Part 234 of the Board's Economic Regulations and, in addition, New York-San Juan. Local service carriers shall, in

addition to reports which may be required by Part 234, file such data for the five top-ranking markets of each. The reports shall cover the third month in each calendar quarter and shall be filed within 45 days after the month covered by the report. In addition, carriers shall file, on a monthly basis, the information requested in Appendix B (CAB Form 251). These reports may be on a system basis or limited to those stations accounting for 67 percent of the carrier's total enplanements, or the top 15 stations, whichever number is greater. The information in Item 4 shall be limited to the passengers enplaned at the reported stations and not the system total. Further, a list of the stations included should be appended to each report. These reports are to be submitted within 30 days after the month covered by the report. Those carriers with both domestic and international operations shall file separate reports for each. Reports covering international operations shall be withheld from public disclosure.

(Secs. 204(a) and 416(a) of the Federal Aviation Act of 1958 (72 Stat. 743 and 771; 49 U.S.C. 1324 and 1386). Interpret or apply secs. 102, 403, 404 and 411 of the Federal Aviation Act of 1958 (72 Stat. 740, 758, 760 and 769; 49 U.S.C. 1302, 1373, 1374 and 1381) and secs. 3 and 4 of the Administrative Procedure Act (81 Stat. 54, 80 Stat. 383; 5 U.S.C. 552 and 553).)

By the Civil Aeronautics Board:

HAROLD R. SANDERSON

Secretary

(SEAL)

Note: The reporting requirements contained herein have been approved by the Bureau of the Budget in accordance with the Federal Reports Act of 1942.

CAB Form 250
(8-67)

Budget Bureau No. 39-R0090

UNACCOMMODATED PASSENGER REPORT

Carrier _____

_____, 19__

City Pairs (By Direction)	Denied Boardings 1/ Qualified for Compensation	Denied Boardings 1/ Exceptions per Tariff Rule 2/	Downgrades	Upgrades	Total Enplaned Passengers

Note: Carriers will report only nonstop flights on this form.

1/ Number of passengers denied space on flights for which they held a valid ticket.
2/ (a) Government requisition of space; (b) substitution of equipment; (c) arrangement for alternate means of transportation for passenger which, at the time such arrangement was made, was planned to arrive at the passenger's next point of stopover not later than two hours after the time of the flight, for which confirmed reserved space was held, was planned to arrive in the case of interstate and overseas air transportation, or four hours after such time in the case of foreign air transportation; and (d) passenger accommodation on the flight for which he held confirmed reserved space, but was seated in a section of the aircraft other than that specified by the ticket.

Budget Bureau No. 39-R0090

CAB Form 251
(8-67)

CIVIL AERONAUTICS BOARD
WASHINGTON, D. C.
REPORT OF PASSENGERS DENIED CONFIRMED SPACE
TO BE FILED WITHIN 30 DAYS AFTER TERMINATION OF EACH MONTH

Carrier _____ Month of _____, 19__

	No. of Passengers
1. Passengers who received compensation in accordance with Rule , or Rule of Airline Tariff Publishers, Inc., Agent, CAB No. or subsequent similar tariff rule	
2. Passengers who qualified for compensation in accordance with Rule , or Rule (3) of Airline Tariff Publishers, Inc., Agent, CAB No. but did not accept or were not offered compensation under such, or subsequent similar tariff rule	
3. Passengers who did not receive compensation in accordance with provisions for exceptions contained in Rule , or Rules (3) of Airline Tariff Publishers, Inc., Agent, CAB No. or subsequent similar tariff rule:	XXXXXXXX
(a) Government requisition of space	
(b) substitution of equipment	
(c) arrangement for alternate means of transportation for passenger which, at the time such arrangement was made, was planned to arrive at the passenger's next point of stopover not later than two hours after the time of the flight, for which confirmed reserved space was held, was planned to arrive in the case of interstate and overseas air transportation, or four hours after such time in the case of foreign air transportation	
(d) passenger accommodation on the flight for which he held confirmed reserved space, but was seated in a section of the aircraft other than that specified on his ticket: Upgrade	
Downgrade	
Total 1/	
4. Number of passengers enplaned	

1/ Total would include all passengers denied confirmed space during the reporting period. Include appropriate notes in the event that the sum of the specific items listed does not agree with the total.
Note: Any abnormal condition, such as strikes which have a bearing upon the results during the reporting period, should be noted.

Supreme Court, U. S.
FILED
OCT 24 1975

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-455

RALPH NADER,

Petitioner,

v.

ALLEGHENY AIRLINES, INC.,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

BRIEF FOR RESPONDENT IN OPPOSITION

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Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF FOR RESPONDENT IN OPPOSITION

QUESTIONS PRESENTED

Whether the judgment of the court of appeals is final so as to permit review by this Court.

Whether the court of appeals has deviated from well established principles of the doctrine of primary jurisdiction by deferring petitioner's tort claim until the agency statutorily charged with regulating the allegedly tortious activities has spoken on the permissibility of the activities.

STATUTES INVOLVED

Sections 102, 404(b), 411 and 1002(e) of the Federal Aviation Act of 1958, as amended, 49 U.S.C. §§ 1302, 1374(b), 1381, and 1482(e), provide:

Section 102. [49 U.S.C. § 1302.] In the exercise and performance of its powers and duties under this chapter, the Board shall consider the following, among other things, as being in the public interest, and in accordance with the public convenience and necessity:

(a) The encouragement and development of an air-transportation system properly adapted to the present and future needs of the foreign and domestic commerce of the United States, of the Postal Service, and of the national defense;

(b) The regulation of air transportation in such manner as to recognize and preserve the inherent advantages of, assure the highest degree of safety in, and foster sound economic conditions in, such transportation, and to improve the relations between, and coordinate transportation by, air carriers;

(c) The promotion of adequate, economical, and efficient service by air carriers at reasonable charges, without unjust discriminations, undue performance or advantages, or unfair or destructive competitive practices;

(d) Competition to the extent necessary to assure the sound development of an air-transportation system properly adapted to the needs of the foreign and domestic commerce of the United States, of the Postal Service, and of the national defense;

(e) The promotion of safety in air commerce; and

(f) The promotion, encouragement, and development of civil aeronautics.

Section 404(b). [49 U.S.C. § 1374(b).] No air carrier or foreign air carrier shall make, give, or cause any undue or unreasonable preference or advantage to any particular person, port, locality, or description of traffic in air transportation in any respect whatsoever or subject any particular person, port, locality or description of traffic in air transportation to any unjust discrimination or any undue or unreasonable prejudice or disadvantage in any respect whatsoever.

Section 411. [49 U.S.C. § 1381.] The Board may, upon its own initiative or upon complaint by any air carrier, foreign air carrier, or ticket agent, if it considers that such action by it would be in the interest of the public, investigate and determine whether any air carrier, foreign air carrier, or ticket agent has been or is engaged in unfair or deceptive practices or unfair methods of competition in air transportation or the sale thereof. If the Board shall find, after notice and hearing, that such air carrier, foreign air carrier, or ticket agent is engaged in such unfair or deceptive practices or unfair methods of competition, it shall order such air carrier, foreign air carrier, or ticket agent to cease and desist from such practices or methods of competition.

Section 1002(e). [49 U.S.C. § 1482(e).] In exercising and performing its powers and duties with respect to the determination of rates for the carriage of persons or property, the Board shall take into consideration, among other factors—

(1) The effect of such rates upon the movement of traffic;

(2) The need in the public interest of adequate and efficient transportation of persons and property by air carriers at the lowest cost consistent with the furnishing of such service;

(3) Such standards respecting the character and quality of service to be rendered by air carriers as may be prescribed by or pursuant to law;

(4) The inherent advantages of transportation by aircraft; and

(5) The need of each air carrier for revenue sufficient to enable such air carrier, under honest, economical, and efficient management, to provide adequate and efficient air carrier service.

STATEMENT

A. The Facts

This action arises from petitioner Nader's failure to get a seat on Allegheny Airlines Flight 864 from Washington, D.C. to Hartford, Connecticut on April 28, 1972. Nader arrived at the gate sometime after 10:05 a.m. for the 10:15 a.m. flight (C.A. App.[1] 35-36) and learned that all of the seats were occupied by reservations-holding passengers. (C.A. App. 77-79.) Nader was denied boarding on the Allegheny flight because he arrived at the gate later than all of the other Washington passengers that the flight could accommodate. (*Id.*)

Despite the fact that he held a ticket and a reservation, Nader could not be boarded on Allegheny's flight because the flight had been "overbooked" pursuant to an industry-wide practice designed to ameliorate the harmful effects of late cancellations and "no-shows"—reservations-holding passengers who do not appear at flight time (hereinafter collectively referred to as "no-shows"). (C.A. App. 66-71, 152-205.)

[1] As in the Petition, "C.A. App." will be used to refer to the printed appendix in the court of appeals.

If airlines did not overbook—that is, accept more reservations for a flight than the flight's capacity—all flights would depart partially empty because of no-shows. (C.A. App. 66-71, 152-205.) Accordingly, airlines, including Allegheny, make statistical studies of the pattern of no-shows for each flight and accept a number of reservations in excess of the flight's capacity based on the number of no-shows that computer analysis of the flight indicates will occur. (C.A. App. 152-205.)

The purpose of Allegheny's statistical analysis of no-shows, and its consequent overbooking, is to insure that each of its flights will depart with as few empty seats as possible. (C.A. App. 124.) Despite close statistical studies of each flight, every one of which is analyzed periodically, Allegheny's fully-booked flights customarily depart with empty seats.

Occasionally, if actual no-shows for a flight deviate widely from the statistical pattern, more ticket-holding passengers will arrive for a flight than the flight can accommodate. Consequently, some passengers who have come to the airport with tickets will be denied boarding on the flight. Those passengers are called "oversales."

The Civil Aeronautics Board (hereinafter "CAB"), which regulates Allegheny pursuant to the Federal Aviation Act of 1958 (C.A. App. 6-7, 13), has examined extensively the airline industry's overbooking practices in a series of proceedings over many years. (App. A8-A14.)[2] The CAB views overbooking as within its regulatory authority (C.A. App. 152-205), and it has chosen not to ban overbooking but instead to require tender of denied boarding compensation on a reasonable scale to

[2] The term "App." will be used to refer to the Appendices to the Petition.

passengers oversold as a result of overbooking.[3] (C.A. App. 50-51.)

Moreover, the CAB in 1967 *considered and rejected* a proposed rule that would have required airlines to advise passengers that they could be denied boarding on overbooked flights. (C.A. App. 154-56, App. A10-A11.)[4] As a consequence of the court of appeals' decision below, the CAB is once again considering the matter of advice to passengers on the practice of overbooking. On July 11, 1975, the CAB announced in Order 75-7-54 that it was soliciting comments on how best to determine whether air carriers' information policies with respect to their overbooking practices have been unfair or deceptive. It further stated its intention in that Order to institute a new rulemaking proceeding to consider "the ticket oversale problem."

B. The Proceedings Below

After Nader was denied boarding on April 28, 1972, and after an unsuccessful attempt by his counsel to settle his claim against Allegheny by extracting a promise from the airline "that it would take immediate steps to eliminate overbooking and oversales" (C.A. App. 149), Nader brought suit against Allegheny in the United States District Court for the District of Columbia seeking, together with a co-plaintiff, $250,000 in compensatory and punitive damages. (C.A. App. 11-12.) He and his co-plaintiff Connecticut Citizen Action Group (hereinafter "CCAG"), a consumer group before whom he was scheduled to speak on the day of his abortive flight, claimed that Allegheny was liable to them under the antidiscrimination provision of the Federal Aviation Act of 1958, 49 U.S.C.

[3] Nader refused the denied boarding compensation offered to him by Allegheny. (C.A. App. 149.)

[4] It is the failure to give such advice that is the gravamen of petitioner's common law misrepresentation claim.

§ 1374(b) (1970) (text at p. 3, *supra*), and under common law tort principles of misrepresentation, for failing to disclose its overbooking practices.

After a trial to the court, Judge Charles Richey entered a judgment for Nader on both the discrimination and misrepresentation claims and awarded him $10 in compensatory damages and $25,000 in punitive damages. He also entered judgment for CCAG on its misrepresentation claim and awarded it $51 in compensatory damages and $25,000 in punitive damages. (App. B10-B11.)

On review by the United States Court of Appeals for the District of Columbia Circuit, in which Allegheny was supported by amicus briefs of the CAB and the Air Transport Association of America, that court reversed the district court and remanded the case for further proceedings.

With respect to the judgment for Nader on his claim of fraudulent misrepresentation,[5] the court of appeals reversed as clearly erroneous the district court's finding that Allegheny affirmatively misrepresented to Nader that he had a guaranteed reservation for a seat. (App. A26.) The court held that Nader had not proved Allegheny liable to him for the tort of misrepresentation; rather, the court found that Nader's claim, if any, was

[5] With respect to the district court's judgment for Nader on the antidiscrimination claim, the court of appeals held that the lower court made errors of law and clearly erroneous findings of fact, and it remanded that portion of the case with directions to make new findings of fact and conclusions of law and to reopen the record if necessary. (App. A14-A24, A49-A50.) Review is not sought by the petitioner of that portion of the court of appeals' judgment.

The court of appeals further held that co-plaintiff CCAG could not recover from Allegheny on its claim of misrepresentation because it was not within the class of persons whom Allegheny had reason to expect might act in reliance on its statements, and the court reversed the judgment for CCAG. (App. A40.) Review of that portion of the court of appeals' decision is likewise not sought by the Petition.

for nonrepresentation. (App. A25-A26.) The court held that before the district court considered that claim it must, pursuant to "an application of the principles of primary jurisdiction," stay its proceedings until the CAB had spoken, in a proceeding that the CAB is currently conducting, on the issue of whether Allegheny's alleged nondisclosure of its overbooking practices was "deceptive" or "unfair" within the provisions of § 411 of the Federal Aviation Act (49 U.S.C. § 1381, text at p. 3, *supra*). (App. A32, A37.) The court further held that the CAB's mandate to "effectively regulate the airline industry in the public interest" pursuant, *inter alia*, to 49 U.S.C. §§ 1302 and 1482(e) (1970) (text at pp. 2 and 3, *supra*) requires that if the agency finds Allegheny's overbooking practices not to be deceptive or unfair, then those practices as a matter of law cannot constitute common law misrepresentation. (App. A30.)

If, however, the CAB finds Allegheny's practices to have been deceptive or unfair, the court of appeals directed the district court to determine whether Nader could recover for Allegheny's alleged nonrepresentation. (App. A26, A37.) The court of appeals ruled that in any further district court proceedings Allegheny should not be held to a standard of full disclosure as a fiduciary, as the district court had erroneously decided. (App. A49.) The district court was also directed to consider, in determining whether punitive damages should be imposed in the event Nader was permitted to recover on his claim, whether Allegheny had a good faith defense to punitive damages by its reasonable belief at the time of the occurrence that its overbooking policies were lawful and approved by the CAB. (App. A48-49.)

ARGUMENT

I. The Judgment of the Court of Appeals Sought to be Reviewed is not Final, and There is no Compelling Reason for Premature Review.

As the preceding Statement demonstrates, the judgment of the court of appeals sought to be reviewed by the Petition is not final. The court of appeals' opinion calls for further proceedings that may entail the taking of additional evidence, both at the district court and at the CAB, before Nader's rights are finally determined. According to the standards for review applied by this Court, the court of appeals' interim judgment should not be reviewed and the Petition for a Writ of Certiorari should be denied.

An examination of the directions of the court of appeals on remand reveals the various proceedings yet to occur in this litigation. The outcomes of those proceedings might moot the issue that the Court is asked to review and render advisory any decision the Court might reach if it grants this Petition. The examination will also reveal that there are conflicting factual contentions that remain to be resolved, not only by the district court, but also by the CAB whose expertise the court of appeals has ordered should be brought to bear on the deceptiveness, *vel non*, of Allegheny's overbooking practices, the issue at the heart of the present dispute.

The district court was directed by the court of appeals to resolve three factual issues, by reopening the trial record, if necessary, on Nader's claim under the antidiscrimination provision of the Federal Aviation Act. The district court was asked to resolve: whether Allegheny's own operations manual properly established denied boarding priority rules, as it is required to do by CAB regulations; what those rules were and whether they were properly interpreted by Allegheny's agent;

and whether the agent's testimony was credible in light of certain documentary evidence. (App. A24.) While it might be contended that these factual issues do not bear directly on Nader's misrepresentation claim, they do go to the heart of Nader's claimed injury—his denied boarding. Resolution of the issues might also affect Allegheny's defense to the imposition of punitive damages on the misrepresentation claim that the district court was directed to consider, *i.e.*, whether Allegheny reasonably believed that its overbooking practices had been approved by the CAB. (App. A48-49.) Morover, the issues are certainly ones that an appellate court would want resolved before rendering a judgment on review.

A second reason for the unreviewability of the court of appeals' judgment is the nature of the stay imposed by the court on the proceedings below. The court of appeals, in an "application of the principles of primary jurisdiction" (App. A32), directed the district court to defer further proceedings on Nader's misrepresentation claim until the CAB had spoken on the issue of whether Allegheny's failure affirmatively to disclose its overbooking practices was deceptive or unfair. (App. A50.) After noting that the CAB in 1967 had ruled that airlines *need not disclose* the overbooked condition of their flights to prospective passengers (App. A10),[6] the court found that the CAB was again considering the fairness and reasonableness of airlines' overbooking practices, that an administrative law judge had initially found the overbooking practices not to be deceptive, and that this decision was on review by the full CAB. (App. A33-A37.)

[6] The CAB had found that such disclosure would be contrary to the public interest in that it (1) would create anxiety and confusion on the part of the traveling public, (2) would cause travelers to make a great number of duplicative and protective reservations, (3) would produce a rapid turnover of reservations within 24 hours before the departure of a flight, (4) would increase the no-show problem. (App. A10.)

It has been pointed out *supra* at p. 6 that the CAB is now in the process of insuring that the issue raised in this litigation will be specifically considered in the Board's proceedings.

In asking the district court to await the CAB's decision on the deceptiveness *vel non* of Allegheny's overbooking practices before continuing its own proceedings, the court of appeals was honoring the primary jurisdiction doctrine, which holds that "a court should not act upon subject matter that is peculiarly within the agency's specialized field without taking into account what the agency has to offer, for otherwise parties who are subject to the agency's continuous regulation may become the victims of uncoordinated and conflicting requirements." 3 K. Davis, Administrative Law Treatise, § 19.01 at 5 (1958). By granting the instant Petition, which seeks a ruling on the relationship between the courts and the CAB on the matter of airlines' overbooking practices, *before* the CAB has definitively spoken on those practices and *before* the district court has considered the CAB's expertise, the Court would be ignoring the doctrine of primary jurisdiction and would, perforce, be violating the doctrine of finality of judgments, which will be discussed more fully below.

A third reason for the unreviewability of the court of appeals' judgment is that the outcomes of further proceedings before the CAB and the district court contemplated by the court of appeals' decision may moot the issue for which review is sought by the Petition and, consequently, render advisory any opinion that the Court might reach if it granted the Petition. If the CAB concludes in its current proceeding, in which it will specifically consider the issue identified by the court of appeals, that Allegheny's overbooking practices are deceptive or unfair, then the district court will litigate Nader's common law tort claim (App. A49), and the

petitioner's contention that the CAB "may retroactively immunize common law frauds from civil liability" will be mooted. Similarly, if the CAB holds that its 1967 ruling permitting nondisclosure of an overbooked condition was dispositive of the matter, as has been suggested by comments in response to the Board's Order 75-7-54 (*e.g.*, Comments of American Airlines, Inc. (August 8, 1975), Emergency Reservations Practices Investigation, C.A.B. Docket 26253, at 5, 7-8), then petitioner's "retroactive immunization" argument will likewise be mooted. It would be contrary to the principles of appellate review consistently applied by this Court to rule on the legality of potential CAB activity—"the immunization" of a common law tort—when that activity might not take place. Rather, the teachings of the doctrine of finality of judgments are that this Court should wait until a full record is made and all proceedings are at an end before engaging in appellate review.

The rule that ". . . except in extraordinary cases, the writ [of certiorari] is not issued until final decree" has been honored for all of this Court's history. *Hamilton-Brown Shoe Co.* v. *Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916). The rule's rationale is to prevent this Court from engaging in piecemeal proceedings and from rendering opinions which, because the litigation is not final, ". . . might subsequently prove to be unnecessary and irrelevant to a complete disposition of the litigation." *Pope* v. *Atl. Coast Line Ry. Co.*, 345 U.S. 379, 382 (1953).

The test for "finality" of judgments has generally been whether there remains further litigation after the rendition of the judgment. If there is "nothing more to litigate" and all that remains is for the lower court to enter judgment as directed by the appellate court, then the judgment is final and reviewable by this Court. *Chicago & Atchison, T. & S.F. Ry. Co.*, 357 U.S. 77, 83

(1958). If, however, there is a remand that directs further litigation at the trial court level, then certiorari is denied. *Bhd. of Locomotive Firemen & Enginemen* v. *Bangor & Aroostook Ry. Co.*, 389 U.S. 327 (1967); *Slaker* v. *O'Connor*, 278 U.S. 188 (1929).

In the instant case, not only has the court of appeals directed further litigation on unresolved factual issues, from which further appeals would lie, but the administrative proceedings to which the district court was directed to show deference have yet to be completed. When the administrative proceedings are complete they may moot entirely the issue that the Court is being asked to review. Furthermore, the Petition mentions no extraordinary reasons for disregarding the doctrine of finality and granting premature review. Accordingly, the Petition for Writ of Certiorari should be denied as seeking review of a judgment that is not final.

II. The Decision Below was Correct and Did Not Deviate From Well Established Principles of Primary Jurisdiction.

Far from being without precedent as the petitioner intimates (Petition at 18-19), the ruling of the court of appeals that Allegheny's policies may be immune from private damage actions if found by the CAB to be necessary to its regulatory scheme is consistent with well established principles of primary jurisdiction.[7]

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[7] Contrary to the tenor of the Petition, the court of appeals did not take away the right of "bumped" airline passengers to seek damages in court. It reaffirmed the denied boarding cause of action pursuant to 49 U.S.C. § 1374(b) (1970) (App. A14-A15), which has been characterized as "more generous" than the common law (*Mason* v. *Pan American World Airways, Inc.*, 13 Av. L. Rep. 17,114, 17,117 (D.D.C. 1974)), but denied the novel application of the tort of fraudulent misrepresentation to a "bumping" cause of action.

Petitioner argues that there is no precedent for the court of appeals' holding that Allegheny's overbooking practices may not as a matter of law constitute fraudulent misrepresentation if found by the CAB not to be deceptive or unfair pursuant to § 411 of the Federal Aviation Act. However, Petitioner does not, because he cannot, contend that the CAB is without power prospectively to immunize airlines from private actions that are inconsistent with the regulatory scheme. Notwithstanding § 1106 of the Federal Aviation Act (text of Petition, p. 3) preserving common law remedies, a contention that the CAB may not prospectively immunize is untenable in view of *Texas & Pac. Ry. Co.* v. *Abilene Cotton Oil Co.*, 204 U.S. 426 (1907), and its progeny, and *Hughes Tool Co.* v. *Trans World Airlines, Inc.*, 409 U.S. 363 (1973).

In the *Abilene Cotton Oil Co.* case, specifically relied on below by the court of appeals (App. A31), this Court held that the existence of a common law rights preservation clause in the Interstate Commerce Act virtually identical to the clause invoked by petitioner was not an impediment to the barring of common law actions challenging rates that had been approved by the Interstate Commerce Commission. *Id.* at 446-47. Petitioner's attempt to distinguish *Abilene Cotton Oil Co.* (Petition at 19 n.22) as a case involving the reasonableness of rates, as contrasted to the instant case which the court of appeals found involves practices having "a significant rate making effect" (App. A30), must fail. The rationale of the *Abilene Cotton Oil Co.* case, quoted below, is as persuasive for actions challenging practices having "a significant rate making effect" as for actions challenging rates themselves:

> For if, without previous action by the Commission, power might be exerted by courts and juries generally to determine the reasonableness of an established rate, it would follow that unless all courts reached an identical conclusion a uniform standard of rates in the future would be impossible, as the standard would fluctuate and vary, dependent upon the divergent conclusions reached as to reasonableness by the various courts called upon to consider the subject as an original question. Indeed the recognition of such a right is wholly inconsistent with the administrative power conferred upon the Commission and with the duty, which the statute casts upon that body, of seeing to it that the statutory requirement as to uniformity and equality of rates is observed. [*Id.* at 440-41.]

Similarly, this Court in *Hughes Tool Co.* v. *Trans World Airlines, Inc.*, 409 U.S. 363 (1973), held, as petitioner concedes (Petition at 18), that the CAB could immunize the actions of airlines from private antitrust claims. Agency immunization has been clearly reaffirmed recently by this Court in *United States* v. *National Association of Securities Dealers*, 95 S. Ct. 2427 (1975).

The question, then, is whether the law has permitted regulatory agencies to do retroactively what they indisputably can do prospectively.[8] The answer to that question must be yes in order to avoid the anomaly described by this Court when it held, in *Pan American World Airways, Inc.* v. *United States*, 371 U.S. 296 (1963), that the CAB could *retroactively immunize* activity within its § 411 jurisdiction—the same section that is invoked in the instant case—from the antitrust laws. In dismissing a suit against regulated airlines and others charging that their activities prior to the 1938 adoption of the Civil Aeronautics Act violated the anti-

[8] Respondent does not concede that eventual CAB action will necessarily operate retroactively. As pointed out *supra* at pp. 11-12 the CAB might hold that in approving Allegheny's over-booking practices it is not doing so retroactively, but is merely reaffirming its approval of the practices, including nondisclosure, that it gave in 1967.

trust laws, this Court held that the CAB, and not the courts, should retroactively approve or condemn the challenged practices:

> It would be strange, indeed, if a division of territories or an allocation of routes which met the requirements of the "public interest" as defined in § 2 were held to be antitrust violations. It would also be odd to conclude that an affiliation between a common carrier and an air carrier that passed muster under § 408 should run afoul of the antitrust laws. [*Id.* at 309.]

Manifestly, it would likewise be "strange" and "odd" if overbooking practices found by the CAB to be within its regulatory scheme, lawful, and in the public interest were held to subject the airlines to damages in common law actions.

If a regulatory agency has the power within its implementing statute to approve certain practices of the industry it regulates, as the CAB without question does with respect to airlines' overbooking practices (App. A5-A14), this Court has held that the courts must defer to such agency approval and resultant immunity even if the alleged injury caused by the challenged practices occurred *before* the practices had been submitted to the agency for approval. *Far East Conf.* v. *United States*, 342 U.S. 570 (1952); *U. S. Nav. Co., Inc.* v. *Cunard S.S. Co., Inc.*, 284 U.S. 474, 486-87 (1932). Such deferral must *a fortiori* occur if the challenged practices, as has arguably occurred in the instant case, have been referred to the agency for consideration, but the agency has not yet ruled. *Laveson* v. *Trans World Airlines*, 471 F.2d 76, 81 (3d Cir. 1972).

Turning finally to petitioner's argument (Petition at 14-18) that deferral to the CAB is improper because his claim is a "private dispute" seeking damages, that issue, too, has well-reasoned precedent supporting the court of

appeals' decision.[9] In *Laveson* v. *Trans World Airlines*, *supra*, a "private dispute" between a passenger and an airline, the plaintiffs argued as does petitioner here that because their suit was solely for antitrust law treble damages, which the CAB has no power to award, the deferral to the agency for its possible immunization of the challenged activities was improper. The court rejected that argument, quoting from the rationale of *S.S.W., Inc.* v. *Air Transport Association of America*, 191 F.2d 658 (D.C. Cir. 1951), *cert. denied*, 343 U.S. 955 (1952):

> The fact remains that, regardless of the particular remedy sought, the subject matter of this action falls within the regulatory jurisdiction of the CAB. If courts fail to apply the primary jurisdiction doctrine in suits for damages, "we might [still] have the [spectacle] of courts throughout the country enjoining practices as violations of the antitrust laws even though the agency specifically authorized to deal with them has determined *or may decide*, subject to judicial review, that such practices serve the interests of the national air transportation policy. [*Laveson* v. *Trans World Airlines*, *supra*, at 83 (emphasis added).]

The same "private action" argument against deferral to the CAB was rejected in *Price* v. *Trans World Airlines, Inc.*, 481 F.2d 844, 848 (9th Cir. 1973).

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[9] The argument of the Petition at p. 16 n.17, that the rationale of the court of appeals' decision would likely have untoward effects on the operation of agencies like the Federal Trade Commission and the Securities and Exchange Commission is answered by the court of appeals at App. A28-A30 and by this Court in *American Airlines, Inc.* v. *North American Airlines, Inc.*, 351 U.S. 79 (1956). The need for uniformity of rates and practices in highly regulated industries like airlines and interstate motor carriers may compel a different application of the doctrine of primary jurisdiction than in "purely private business enterprises" (*id.* at 83) over which agencies like the FTC and the SEC have limited regulatory powers.

CONCLUSION

The Petition should be denied because it seeks review of a judgment that is not final and that contemplates further proceedings, both before the CAB and the district court, which may moot the issue raised by the Petition. Moreover, the judgment of the court of appeals is correct and follows well established principles of the doctrine of primary jurisdiction. Finally, petitioner has failed to show any conflict between the circuits or other factors that would warrant review of the decision below. Accordingly, this Court should deny the Petition for Certiorari.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-455

RALPH NADER,

Petitioner,

v.

ALLEGHENY AIRLINES, INC.,

Respondent.

ON A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR PETITIONER

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IN THE

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OCTOBER TERM, 1975

No. 75-455

RALPH NADER,

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ON A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR PETITIONER

OPINIONS BELOW

The opinion of the court of appeals is reported at 512 F.2d 527 and is set forth as Appendix A to the petition for a writ of certiorari. (Pet. App. A 1-60.)* The decision of the district court is reported at 365 F.Supp. 128

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* References to the appendices in the petition for certiorari will be designated "Pet. App." followed by the relevant page citations. References to the Joint Appendix filed herewith will be designated "JA" followed by the relevant page citations.

and is set forth as Appendix B to the petition. (Pet. App. B 1-11.)

JURISDICTION

The judgment of the court of appeals was entered on May 2, 1975. A timely petition for rehearing, with suggestion for rehearing en banc, was denied by the court of appeals on June 23, 1975. (Pet. App. C 1-2.) The petition for a writ of certiorari was filed on September 22, 1975, and was granted on November 11, 1975, with Mr. Justice Douglas taking no part in the consideration or decision of the matter. The jurisdiction of this Court is conferred by 28 U.S.C. §1254(1).

QUESTION PRESENTED

Whether, notwithstanding a statutory provision preserving common law remedies, the Federal Aviation Act requires that the Civil Aeronautics Board be given the opportunity retroactively to approve fraudulent misrepresentations by an airline that would otherwise constitute actionable torts under state common law, with the effect of extinguishing any private right of action arising from such practices.

STATUTES INVOLVED

Sections 411 and 1106 of the Federal Aviation Act of 1958, as amended, 49 U.S.C. §§1381, 1506, provide:

> Section 411. The [Civil Aeronautics] Board may, upon its own initiative or upon complaint by any air carrier, foreign air carrier, or ticket agent, if it considers that such action by it would be in the interest of the public, investigate and determine whether any air carrier, foreign air carrier,

> or ticket agent has been or is engaged in unfair or deceptive practices or unfair methods of competition in air transportation or the sale thereof. If the Board shall find, after notice and hearing, that such air carrier, foreign air carrier, or ticket agent is engaged in such unfair or deceptive practices or unfair methods of competition, it shall order such air carrier, foreign air carrier, or ticket agent to cease and desist from such practices or methods of competition.
>
> Section 1106. Nothing contained in this Act shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this Act are in addition to such remedies.

STATEMENT

A. The Facts

In early April, 1972 the petitioner Ralph Nader accepted an invitation to make a number of public addresses in the state of Connecticut on behalf of the Connecticut Citizen Action Group ("CCAG"), a non-profit public interest organization concerned with consumer, environmental, and human rights issues. (JA 18.) Mr. Nader's participation was an essential part of the group's plans for a major fund-raising program to elicit much needed financial support from citizens in that state. As a central event in the fund-raising effort, CCAG planned and promoted a "rate-payers rally" to be held during the lunch hour on April 28 in the downtown Hartford business district. To attract a large audience, CCAG arranged to have Mr. Nader address the crowd, preceded by the Mayor and City Council President of Hartford. CCAG anticipated that the rally

would elicit a strong showing of public support for its efforts, both in monetary contributions and in the enlistment of volunteers for canvassing, research, and other projects. (JA 105-106.)

Several days in advance, a confirmed reservation was made for petitioner for the morning of April 28 on Allegheny Airlines flight 864, which was scheduled to arrive at the Hartford airport (Bradley Field) in ample time for him to participate in the rally. (JA 18-19, 112.)[1] CCAG was informed of Mr. Nader's confirmed reservation and made arrangements to meet him at the airport. (JA 107, 112-13.) Petitioner's ticket, which he subsequently purchased from the carrier's agent, specifically indicated, by the standard "OK" notation, that his reservation was confirmed. (Pl. Exh. 1.)

On the morning of his scheduled departure, Mr. Nader arrived at Allegheny's gate at National Airport prior to the departure time, in compliance with all preflight requirements, and presented his ticket for boarding. At the gate, however, petitioner was told by Allegheny's agent that all seats on flight 864 were already occupied and that he would not be accommodated. Several other persons were milling around the gate, also having been refused boarding on the flight despite their confirmed reservations and tickets. (JA 19-20, 100-01.)

Petitioner Nader explained to the agent that it was imperative that he arrive in Hartford in time for his speech and asked the agent, in view of these urgent circumstances,

[1] Flight 864 was the latest flight which would have enabled Mr. Nader to make the rally, although there were earlier scheduled flights that day and, of course, the day before. (JA 31, 108, 114-15.)

to double-check his records to see whether any standby passengers had been boarded on the flight by mistake. The agent refused to perform this simple task, merely repeating that the plane was full and there was nothing he could do about it. (JA 20, 101.) As it later turned out, at least one standby and one person whose reservation had been previously cancelled by the airline were on the plane as a result of "boarding discrepancies". (Pl. Exh. 5, JA 139.)[2] Petitioner then asked the agent whether he or another agent would explain the problem to the passengers on board, with the hope that someone would volunteer to take a later flight and thereby allow Mr. Nader to reach Hartford in time for his speaking engagement. This request also was refused, although making such an appeal would have taken but a moment and the plane did not leave until at least ten minutes later. (JA 21, 83, 85-87.)

Thus, when flight 864 departed, petitioner was literally left standing at the gate, unable to make any other travel arrangements to get to Hartford in time to fulfill his commitment. Allegheny offered Mr. Nader and the other bumped passengers an air taxi flight to Philadelphia, where they might be able to connect with a flight that would arrive in Hartford at 12:15. By arranging for such alternative transportation for the bumped passengers, Allegheny hoped to clear itself of any liability for denied boarding compensation under federal regulations. 14 C.F.R. §250.6 (b). The connection was too close for petitioner to depend on, however. More important, petitioner realized

[2] In addition, Allegheny had no record of any reservations for two other passengers (Demittenaere and Boucher) who were accommodated on the flight. (Pl. Exh. 8, 11.)

that even if he made the connection, he would almost certainly be so late in arriving in downtown Hartford that a lunch hour crowd would have gone back to work by the time he appeared. Petitioner therefore rejected Allegheny's offer and telephoned to let CCAG know that he would not be able to make the rally in Hartford. (JA 22-23, 45.)

Allegheny's failure to honor petitioner's confirmed reservation not only caused him personal inconvenience and embarassment, but also had devastating consequences for CCAG. Its rally in Hartford, planned and promoted on the basis of Mr. Nader's undertaking to deliver the keynote speech, and with the assurance that he would arrive on time by flight 864, was ruined. (JA 106-07.) CCAG thereby lost a unique opportunity to generate contributions at the rally itself, as well as the chance to obtain names and addresses of potential volunteers and contributors drawn to the rally to hear Mr. Nader. Equally important, CCAG suffered loss of its credibility and prestige because of Mr. Nader's failure to appear as advertised.

Mr. Nader had been "bumped" on two prior occasions by airlines other than Allegheny, and in each instance had been led to believe that inadvertence or bureaucratic inefficiency was to blame.[3] Two such mishaps (one occuring during an airline strike) out of the many flights he

[3] Both of the airlines involved in petitioner's earlier bumping experiences apparently have a policy of obscuring the fact that intentional overbooking may be responsible for denial of boarding on their flights. The first, Eastern, currently instructs its employees in its company manual that they should "never use the word 'oversale' in conversation with the denied boarding or within hearing distance of anyone except Company employees involved." Eastern (continued)

had taken did not alert petitioner to question the explanation given for the denial of boarding. (JA 25.) While he had been given a printed statement by the carriers in accordance with federal regulations, that explains to bumped passengers what obligations an airline has to them after a denial of boarding, nothing in that statement suggested that the airline may have engaged in deliberate overbooking. 14 C.F.R. §250.9 (1975). Thus, neither his earlier experience, nor the information he had received from the airlines, nor any published tariff or regulation had revealed to him that bumping might be caused by anything other than human or computer error, weight restrictions, or equipment substitution. (JA 24-25, 33-35, 61, 159-60.)

Petitioner and CCAG were indeed totally unaware that Allegheny had intentionally "overbooked" flight 864 (JA 24, 108), having sold, as of one hour prior to the flight, 107 confirmed reservation tickets for the 100 seats actually available on the aircraft. (Pl. Exh. 4, JA 138). Nor were they aware that Allegheny deliberately and

[3] (continued)
Airlines, Standard Practice Manual: Passenger Boarding Irregularities, Sec. 65-6120, p. 7 (June 4, 1974).

The second, American, which bumped Mr. Nader from a flight five days before the Allegheny incident, states in its employee manual: "Never give an oversold passenger anything in writing which admits an error on the part of American Airlines." It adds: "If a passenger asks reason for oversale, tell him that the reason will be known only after an investigation has been concluded and all facts are revealed." American Airlines, Passenger Service Manual, "Oversold and Inconvenienced Passengers", Sec. 10-63, p. 5 (Sept. 30, 1974).

Both of these documents are on public file at the Civil Aeronautics Board in the Office of the Chief, Passenger and Cargo Rates Division, Bureau of Economics, pursuant to 14 C.F.R. §250.3 (1975).

systematically overbooks its flights whenever possible, in order to enhance company profits by offsetting the effect produced when passengers with reservations fail, for one reason or another, to show up for a flight.[4] (JA 25, 108, 123-24.) Also by overbooking rather than placing people on wait-list status or refusing to accept additional reservations, Allegheny is able to retain the business of customers who might otherwise make their travel arrangements with competing airlines. Allegheny's management continues to overbook, despite its certain knowledge that the practice requires it to dishonor confirmed reservations and thereby

[4] Only a small proportion of the airline industry's "no-show" problem is caused by passengers' failure to cancel reservations that they do not intend to use. A recent investigation by the Civil Aeronautics Board resulted in the following conclusions by its Administrative Law Judge, which no one has challenged:

> The no-show problem is, however, considerably more complex and elusive than the difficulties presented by willful misuse of the reservations systems. The passenger may, for example, fail to cancel or utilize space for a number of reasons beyond his control – clogged telephone lines at the carriers' reservations office, traffic accidents, unavoidable surface transportation delays, illness and family or business emergencies, to mention a few. A fair consensus of the judgment of the carriers is that 50% or less of all no-shows are caused by the actions of passengers, intentional or otherwise.
>
> The balance of the no-shows are carrier-caused, an area that has not been emphasized in past no-show programs. Again, no-shows generated by the carriers can arise in a number of different situations, some avoidable and some not. Common reasons would be human and computer errors in reservations records and the failure of passengers to show because of misconnections.

Emergency Reservations Practices Investigation, CAB Docket 26253 Initial Decision, p. 9, (June 10, 1974).

disrupt travel plans[5] for literally thousands of its customers each year.[6]

Had petitioner or CCAG known in time that Allegheny would overbook flight 864, creating a substantial and predictable risk that some passengers would be "bumped" from the flight, they could and would have made other arrangements to assure his timely arrival in Hartford, either on an earlier flight or by another mode of transportation. (JA 24, 108.) It is hardly surprising, however, that they considered the confirmed reservation for flight 864 to be the carrier's assurance of accommodation on that flight, because Allegheny wants its customers and those awaiting their arrival to have precisely that understanding.[7] Instead of disclosing the truth about its overbooking practice to the public and its passengers, Allegheny has made a concerted effort to conceal and obscure it. In advertising its

[5] JA 135-36. If Allegheny's officials were unaware of the inconvenience and economic loss its policy inflicts upon its customers when denied boarding occurs, certainly the irate correspondence they receive from the victims of bumping should be sufficient to dispel that ignorance. (JA 152-168.)

[6] For example during April 1972 when petitioner's reservation for flight 864 was dishonored, Allegheny denied boarding to a total of 945 persons holding confirmed reservations – over 30 a day on this one airline. (Pl. Exh. 13.) From January 1969 to August 1972, Allegheny bumped almost 16,000 prospective passengers from its flights. (*Id.*) It is clear, however, that overbooking is by no means unique to Allegheny: all the major scheduled airlines indulge in it to some degree. In the most recent year for which CAB industry statistics are available, it appears that over 100,000 passengers were denied boarding on scheduled domestic flights. Civil Aeronautics Board, Passengers Denied Confirmed Space – Calendar Years 1974 and 1973 (March, 1975).

[7] Allegheny's president testified that, subject to "the normal latitudes" of weather and mechanical problems, a confirmed reservation is intended to give a "reasonable assurance of fulfilling one's

(continued)

reservations and related services to the public, for example, the company emphasizes dependability and reliability with not the slightest warning about overbooking or bumping. (JA 118-19.) Further, Allegheny employees are instructed to tell customers bumped due to overbooking that the difficulty has been "caused by an unintentional error made in confirming reservations for the flight," or by "equipment substitution" or "weight restriction" – anything but the true cause. (Pl. Exh. 6, JA 148.)[8] Indeed, the agent responsible for denying boarding to petitioner acknowledged that he would not reveal to passengers that their bumping was due to overbooking:

> A. I usually would advise the passenger that there has been a mistake, exactly what it is, I don't know, unless, of course, it is an equipment substitution, or something like that.
>
> Q. You would not advise him that an intentional overbooking policy may have caused his distress?

7 (continued)
plan, whether it be business or pleasure." (JA 117.) He further testified:

> Q. What is a confirmed reservation on Allegheny?
>
> A. When a passenger calls, if seats are available it's confirmed. . . .
>
> Q. . . .[W]hat is the passenger entitled to expect when he gets a confirmed reservation?
>
> A. Well, he would expect, normally, to have a seat.
>
> Q. And what does Allegheny want him to expect, just that?
>
> A. Of course. (JA 118.)

8 Indeed, many of its own employees are probably unaware that Allegheny engages in deliberate overbooking. Its Passenger Service Manual does not even suggest overbooking as a possible cause of oversales. (Pl. Exh. 6, JA 145.)

> A. No, I don't think I would.
>
> Q. And that is because you do not think it is good publicity for the company, do you?
>
> A. That is true. (JA 96.)

The deception is not restricted to lower echelon employees but extends throughout the company. In correspondence about bumping problems, even the company's top management covers up its overbooking policy, invariably giving assurance that the incidents are isolated and accidental, rather than the inevitable consequence of Allegheny's deliberate practices:

> The oversale at Hartford was indeed unplanned, and I wish to assure you that Allegheny does not purposely oversell any flight. (JA 157.)

> . . . I agree that the oversale of this flight or any other flight is not the kind of service our valued customers deserve. Please be advised that each and every oversale is investigated with corrective action instituted in an effort to prevent recurrence. (JA 159.)

> Oversales are few when compared to the number of departures . . . . However, through human or computer error if we are not properly advised, our total number of commitments do occasionally exceed our total number of seats available. (JA 160.)

> . . . I deeply regret the fact that you were denied a seat on one of our March 9 flights to Washington. . . . . In today's computerized environment, this should not have happened and

> we are probably more interested in the cause than even you are. (JA 165.)
>
> . . . in August of 1970, Allegheny introduced a computerized name and flight reservation system and this has reduced the number of oversale incidents considerably. (JA 168.)

Thus, intentional overbooking – and the attendant risk of dishonored reservations – has been treated virtually as a top secret matter by Allegheny. The company knows full well that the disruption of travel plans because of oversales may result in serious upset, inconvenience, and even economic losses to the unlucky travelers, as well as persons awaiting their arrival. Yet it holds out and offers to the public what it characterizes – and hopes will be relied upon – as firm reservations assuring accommodations on specified flights, without revealing that not all reservation holders can in fact be accommodated. This deliberate practice of intentional concealment by Allegheny provides the factual backdrop for the issue presented to the Court in this case.

B. The Decision of the District Court

Regulations of the Civil Aeronautics Board, 14 C.F.R. Part 250 (1975), generally require airlines to tender compensation to passengers with confirmed reservations who have been denied boarding, unless the airline can arrange comparable transportation that will reach the passenger's destination within two hours of the time his original flight was scheduled to arrive.[9] The denied boarding

[9] Other conditions that relieve airlines of the obligation to tender denied boarding compensation are not relevant to this case. See 14 C.F.R. §250.6.

compensation, equivalent to the value of the passenger's ticket, so long as it is more than $25 or less than $200, serves as "liquidated damages" if accepted by the passenger. As Allegheny concedes, however, the remedy provided by the CAB is not exclusive and the passenger need not accept it. (JA 72-73.) When Allegheny tendered $32.41 to petitioner to compensate him for the damages attendant upon its failure to honor his confirmed reservation, Mr. Nader chose to reject the offer and, together with CCAG, filed a damage action against Allegheny in the United States District Court for the District of Columbia. (JA 1-6.)

Two distinct bases for liability were set out in the complaint. One was a claim of fraudulent misrepresentation, based on Allegheny's intentional concealment of its overbooking practice in connection with the confirmation of reservations. Jurisdiction over this "state" claim, arising under the common law of the District of Columbia, was based on diversity of citizenship. 28 U.S.C. §1332.[10] Additionally, the suit contended that the carrier had violated its duty of non-discrimination under section 404(b) of the Federal Aviation Act, 49 U.S.C. §1374(b), by failing to afford petitioner the boarding priority appropriate to his confirmed reservation. Federal jurisdiction over the statutory claim was asserted and found under 28 U.S.C. §1337.

After extensive pre-trial proceedings, the case was tried before the court without a jury. On October 18, 1973, the district court entered a judgment for petitioner on

[10] The district court also found the non-federal claim to be properly before it under the pendent jurisdiction doctrine. (Pet. App. B 7.)

both the misrepresentation and discrimination claims, awarding him $10 in compensatory damages and $25,000 in punitive damages. Judgment was also entered for CCAG on its misrepresentation claim, with an award of $51 in compensatory damages and $25,000 in punitive damages. (Pet. App. B 10.)

Allegheny had contended that the Federal Aviation Act gave the Civil Aeronautics Board exclusive jurisdiction to consider the legality and propriety of airline reservations practices, ousting entirely the court's common law jurisdiction with respect to such practices. However, its own expert witness on the CAB's regulatory policies testified that, while the Board had never banned overbooking outright, it had expressly recognized and sought to preserve the right of passengers to pursue common law claims for damages suffered as a result of overbooking. (JA 72-73.) Citing that testimony and the CAB's regulations, 14 C.F.R. Part 250, the trial court rejected the contention that its jurisdiction had been preempted. (Pet. App. B 5.)

Proceeding to consider the fraudulent misrepresentation claim, the district court applied the common law definition of that tort under local law.[11] Allegheny, the court found, holds itself out to the public through advertising and other means as offering reliable reservations which, if confirmed by the airline for a particular flight, will assure the prospective passenger of a seat on that flight. (Pet.

[11] See *Isen v. Calvert Corp.*, 379 F.2d 1266 (D.C. Cir. 1967); *Sankin v. 5410 Connecticut Avenue Corp.*, 281 F.Supp. 524 (D.D.C. 1968), *aff'd sub nom., Benn v. Sankin*, 410 F.2d 1060 (D.C. Cir. 1969), *cert. denied*, 396 U.S. 1041 (1970); see also *Pence v. United States*, 316 U.S. 332, 338 (1942); *United States v. Kiefer*, 228 F.2d 448 (D.C. Cir. 1955), *cert. denied*, 358 U.S. 828 (1956); 3 ALI RESTATEMENT, TORTS §529, quoted with approval in *Equitable Life Insurance Co. v. Halsey, Stuart & Co.*, 312 U.S. 410, 425-26 (1941).

App. B 4.) On the other hand, according to the district court's findings, the company is aware that its substantial overbooking practice inevitably results in the denial of boarding to some passengers holding reservations, thereby causing "severe distress and financial loss" to persons relying on such confirmed but dishonored reservations. Yet nothing in Allegheny's advertising makes the public aware of its intentional overbooking practice or the fact that there is "a substantial risk that confirmed reservations will be dishonored." (Pet. App. B 4.) The trial court concluded that Allegheny had knowingly misrepresented a material fact in confirming the petitioner's reservation, namely that he had a guaranteed reservation for a seat on the flight;[12] that this was actually and reasonably relied on by the plaintiffs; and that it resulted in injury to the plaintiffs for which the carrier was liable. (Pet. App. B 7-8.)

The Court also found the carrier liable to petitioner on the discrimination claim, based on the fact that it dishonored his confirmed reservation while permitting passengers with subsequent or no reservations to be accommodated. Allegheny, it was concluded, failed to sustain its burden of proof under *Archibald v. Pan American World Airways*, 460 F.2d 14 (9th Cir. 1972), and *Wills v. Trans World Airlines*, 200 F.Supp. 360 (S.D.Cal. 1961), that it had adhered to reasonable and nondiscriminatory policies in barring petitioner from the flight. Moreover, because Allegheny acted knowingly and willfully, and in light of the airline's responsibilities to the community as a common carrier, its holding out to the public that

[12] In the opinion of the circuit court, the case involved "non-representation" rather than "misrepresentation." This distinction arose from the fact that, while Allegheny admittedly confirmed petitioner's reservation, there was no evidence in the record that it "guaranteed" a seat. (Pet. App. A 26.)

confirmed reservations assure accommodation on particular flights, its stress on reliability in its advertising, and its awareness of the harm likely to occur when passengers are bumped, the district court concluded that punitive as well as compensatory damages were in order. (Pet. App. B 6, 9.)

C. The Decision of the Court of Appeals

On appeal, the United States Court of Appeals for the District of Columbia Circuit reversed the decision of the district court. With respect to the federal statutory claim, the circuit court considered the lower court's findings so ambiguous that it could not ascertain whether the proper legal standard had been applied, specifically whether Allegheny was found to have affirmatively violated its own priority rules in refusing accommodation to petitioner. That aspect of the case was remanded for further findings by the trial court and is not before this Court.

As to the petitioner's common law misrepresentation claim, the circuit court held that "it is manifest that Nader was not in privity with Allegheny at the time of the misrepresentation nor was he identified as a person to whom the misrepresentation was directed." (Pet. App. A 42.) Nevertheless the court determined that petitioner was within the class of potential passengers whom Allegheny "intended to influence" and could therefore recover for his reliance on the misrepresentation. (*Id.*) The court decided, however, that CCAG was "a party more remote to the transaction," "really a member of a vast indeterminate class that may be equated with the public itself." (*Id.*) The fact that Allegheny admittedly knew that persons other than passengers rely as a matter of course on

its confirmed reservations and may suffer injury when reservations are not honored (JA 119-20, 135-36) did not bring CCAG within the class of third persons who could recover for the carrier's intentional tort. In the court's view, "foreseeability is not the test," for if it were, "virtually any plaintiff, no matter how far removed from the transaction or incident, could recover the full amount of his damages." The court concluded, "CCAG cannot recover as Allegheny's duty did not extend to it." (Pet. App. A 43, footnote omitted.)

In considering the carrier's liability to petitioner under the common law misrepresentation claim, the circuit court correctly rejected respondent's contention that the CAB has exclusive regulatory authority over airline practices which totally preempts the jurisdiction of the courts to entertain such damage actions. (Pet. App. A 26-28.) It proceeded, however, to focus on what it perceived as a potential area of conflict between the common law and the regulatory powers vested in the CAB, imposing a solution that had not been suggested in any brief or at oral argument by any party or *amicus*, including the Board itself upon which new functions were being thrust. The majority, entirely on its own, concluded that the common law damage claim had to be remanded to the district court and stayed pending referral to the CAB to determine whether the practices in question were "unfair or deceptive" within the meaning of section 411 of the Federal Aviation Act, 14 U.S.C. §1381. (Pet. App. A 32-33.) Starting from language contained in this Court's decision in *American Airlines v. North American Airlines*, 351 U.S. 79 (1956), as to the scope and extent of the Board's regulatory powers over the airline industry, and combining it with an assumption that reservation practices have a significant relationship to rates

for air transportation, the circuit court concluded that "the common law remedies for fraud and deceit cannot remain totally unaffected by" the Aviation Act. The court reached this conclusion despite the plain and contrary language of section 1106 and the fact that the only provision viewed as in potential conflict with the common law claim, section 411, appeared on its face designed to enable the CAB to search out and prevent conduct similar to the conduct against which a common law misrepresentation claim is directed. Congress, the court reasoned, must necessarily have intended the Board's authority "to include the approval in the public interest of some practices that might be considered common law misrepresentations." (Pet. App. A 30.) The method by which the CAB "approves" otherwise actionable deceptions is to investigate them under section 411 and thereafter to determine that the public interest does not merit issuance of a cease and desist order against them. The court went on to rule that if the Board did in fact exercise its power in this manner,

> [T]he effect of such approval, or a holding that they do not represent deceptive practices, would be to establish that the practices, as a matter of law, do not constitute common law misrepresentations. (*Id.*)

In that event, no common law right to recover damages as compensation for injuries suffered as a result of such practices would survive the CAB's determination. (Pet. App. A 31.)

Here, however, it is clear that in fact the CAB has never ruled that any airline's overbooking or related practices are not deceptive, or otherwise should be approved. Yet the circuit court decided that the CAB's approval of

questionable airline practices could take place not only on a prospective basis, but *retroactively* as well, in effect eradicating a common law tort claim after it had arisen. The very enactment of the Aviation Act necessitated such an "alteration of the common law," the court wrote, so that the Board would be able to regulate the industry effectively. (*Id.*) As a result, according to the opinion below, the duty of determining whether any given practice is deceptive or unfair for purposes of common law liability has been reassigned from the courts to the CAB:

> Given this interpretation, when the allegedly tortious practice is one that has been directly regulated by the Board, or while not regulated is so obviously tied to a regulated practice or rate that a change in one would require a change in the other, the Board must determine, in the first instance, whether the practice falls within the ambit of the deceptive practices provision of section 411.[13]

The court thus concluded that the judgment in favor of petitioner had to be reversed and remanded to the trial court, to await a definitive ruling from the CAB as to whether the practices in question were considered to be deceptive within the meaning of section 411. This approach was especially suitable, in the court's view, because "the problems are as wide as the industry itself, [so] a single, industry-wide resolution is appropriate."[14]

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[13] *Id.* In footnote 40, omitted from the above quotation, it was noted that a finding of deceptiveness by the Board would not itself establish common law liability, since other elements of the tort would remain to be adjudicated by the court.

[14] Pet. App. A 32. Industry-wide regulation, of course, was precisely what the Board concluded in 1967 it should *not* attempt. See discussion below, pp. 24-36.

The court noted, however, that it might not actually be necessary for the parties to this suit to undertake a new adjudicatory proceeding before the Board. It took judicial notice of a rulemaking proceeding that had been initiated by the Board at the height of the 1973-74 fuel crisis to determine whether that situation necessitated changes in the carriers' reservations practices.[15] The court then expressed its view that that proceeding provides an appropriate forum for the agency to determine whether Allegheny's overbooking practices were deceptive under section 411, in effect directing the agency to proceed with that determination in the fuel crisis proceeding.[16]

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15 *Emergency Reservations Practices Investigation*, EDR-260, CAB Docket 26253.

16 In initiating the *Emergency Reservations Practices Investigation* on December 21, 1973 – over three months after the district court issued its decision in this litigation – the Board did *not* invoke its powers under section 411. See CAB Order 73-12-93, 39 F.R. 823 (1974). That fact, and the fact that the CAB's Administrative Law Judge excluded from the record any evidence pertaining to the Allegheny practices at issue in this litigation, (Transcript of Hearing, Jan. 31, 1974, CAB Docket 26253, pp. 109-10, 116) seem to have been overlooked by the court of appeals. Apparently because a consumer group which intervened in the proceeding had suggested that the Board prospectively ban overbooking, the court assumed that the Board would proceed in that investigation to pass upon the legality of those practices. In July 1975 the Board solicited recommendations from interested parties as to what course of action would be appropriate for it to take, in response to the court of appeals' decision, with respect to the Allegheny practices at issue, and it also indicated its intention to initiate a new rulemaking proceeding to review once again the problem of ticket oversales. Order No. 75-7-54, 40 F.R. 30150 (1975).

Senior Circuit Judge Fahy strongly dissented from this unprecedented holding that, in his words, "now vests the Board with decisional authority to determine that an individual who has suffered injury due to a carrier's fraudulent misrepresentation, and who would otherwise have a common law remedy, would have no such remedy should the Board determine the conduct was not deceptive." (Pet. App. A 52.) Troubled by the obvious conflict between the court's holding and the express preservation of common law remedies in section 1106 of the Aviation Act, as well as the realignment of the respective functions of courts and regulatory agencies, Judge Fahy wrote as follows:

> . . . the court thus divests itself not only of the authority to adjudicate a claim of fraudulent misrepresentation but also vests the Board with authority to define fraudulent misrepresentation in a manner which the courts must accept for the airline industry. I do not find that Congress has so provided or intended. Indeed, section 1106 seems to me clearly to the contrary. Section 411 affords, or denies, only a statutory remedy, unknown to the common law. (*Id.*)

The adjudication of common law tort claims, in Judge Fahy's view and petitioner's, is a job for the courts alone, entirely independent of the CAB's jurisdiction to control deceptive practices under section 411 of the Aviation Act. (Pet. App. A 53.)

SUMMARY OF ARGUMENT

The decision below is premised on several fundamental misconceptions. First, it misapprehends the manner in which the CAB has chosen to deal with airline oversales by viewing a policy of deliberate non-intervention as positive approval of all practices adopted by the airlines. Second, it reads into the interstices of the Federal Aviation Act an intent to abrogate a common law claim of misrepresentation, despite the fact that the tort claim is perfectly consistent with the Act and is preserved by a savings clause. Third, it misreads section 411 of the Act, which was designed to prevent deception, and thereby converts it into a basis for approving fraudulent misrepresentations. And, finally, it disrupts the traditional functional balance between federal regulatory agencies and common law courts.

The CAB has on a number of occasions reviewed the problem of airline oversales but, contrary to the opinion of the circuit court, has never sanctioned deliberate, concealed overbooking. The Board has consistently adhered to the view that close, direct federal supervision of carrier reservations systems would entail more drawbacks than potential benefits. It has thus avoided exercising the full extent of its powers under section 411 to ban all overbooking, instead seeking through its regulations to provide some degree of compensation for passengers injured by oversales, and to provide a variety of incentives for the airlines to bring about improvements in their own systems. In taking such actions the CAB has consistently cautioned the carriers against deceiving the public in connection with their reservations practices, and has consistently sought to preserve the rights of persons injured as a result of dishonored confirmed reservations to pursue their remedies

under the common law, as an alternative to the acceptance of denied boarding compensation as liquidated damages.

The circuit court also erred in assuming that national uniformity is so essential in matters involving airline reservations practices that the common law remedies for deliberate nondisclosure of overbooking must be overridden or altered, notwithstanding the express savings provision of section 1106 of the Aviation Act. In fact, the CAB itself has consistently rejected the notion that uniform practices are required in the area of reservations, and has permitted carriers great latitude in determining what kind of reservation systems to offer the public. Certainly any such interest as may exist in having uniform air carrier reservations systems does not meet the test of absolute repugnancy for abridgment or alteration of common law remedies, as established by this Court.

Even more fundamentally, the appellate court concluded that the CAB has power to approve fraudulent misrepresentations, and thus insulate them from tort liability, and that the CAB could do so on a retroactive basis. However, there is nothing in the language, purpose or history of the Aviation Act to support that conclusion, and indeed all of the evidence points to the conclusion that a statute basically intended to assure the public an effective air transportation system cannot be the basis for denying a passenger his day in court.

Finally, the decision of the court of appeals will result in administrative chaos, since every tortious misrepresentation case brought in a state or federal court will have to be funneled through the CAB for a preliminary determination. This will surely impose an unnecessary and inappropriate burden on the CAB, requiring it to proceed in countless

cases of a routine nature. The decision thus constitutes a fundamental reallocation of responsibility between the CAB (and presumably other federal agencies) on the one hand and the state and federal courts on the other. Whatever the wisdom of such a reallocation might be, it is a change that can be dictated only by Congress and not by the courts.

ARGUMENT

I. THE CIVIL AERONAUTICS BOARD HAS NEVER SANCTIONED DELIBERATE NONDISCLOSURE OF OVERBOOKING BY RESPONDENT, AND IT HAS CONSISTENTLY ACTED TO PRESERVE ALL COMMON LAW REMEDIES OF OVERSOLD PASSENGERS.

Every year, a significant number of prospective passengers arrive at airline flight gates with what they believe to be confirmed reservations, only to be denied seats on their flights. For some time the CAB has been concerned about this situation and has considered various proposals designed to correct it. The opinion of the circuit court traced a portion of the history of CAB concern, concluding that the Board's conduct reflected approval of the practice of deliberate overbooking as being "in the public interest." (Pet. App. A 14.) As the discussion below will reveal, the accuracy of this characterization is open to serious question. But regardless of how that issue is resolved, it is perfectly apparent that the Board has never sanctioned any airline's deliberate concealment from the traveling public of its overbooking practices or of the significant risk of being bumped. Concealment lies at the heart of petitioner's misrepresentation claim and, thus, at the center of this litigation. Moreover, the history of the CAB's activity in the area of overbooking practices

makes abundantly clear that the Board has consistently regarded the common law remedies of bumped passengers to be entirely consistent with, indeed supportive of, its own policies and responsibilities under the Aviation Act. Far from having sought to abridge or alter such remedies in any way, the Board has always endeavored to preserve them as a necessary and proper alternative to the optional liquidated damages remedy that is made available, in certain circumstances, under its regulations.

Apparently the first expression of concern to emanate from the CAB with respect to overbooking was an "industry letter" sent in July, 1956 by the Chief of its Bureau of Enforcement (then Office of Compliance) to all certificated air carriers.[17] The letter noted that the agency was receiving an increasing number of complaints from passengers bumped from their flights despite holding confirmed reservations. The Board's limited investigation showed that some carriers were deliberately overbooking their flights, leading to the bumping of some passengers "with consequent inconvenience and hardship to these persons and to others." The letter continued:

> While we recognize that a no-show problem exists, we do not believe that deliberate overbooking of flights is the proper solution. It is the opinion of this Office that such a practice and consequent oversales constitute an unfair and deceptive practice within the meaning of Section 411 of the Civil Aeronautics Act.

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[17] For the convenience of the Court, a compilation of relevant CAB regulatory materials concerning reservations practices is being lodged with the Clerk.

Subsequently the enforcement bureau did initiate proceedings against two carriers under section 411 because of their alleged overbooking practices.[18] The first of these proceedings was dismissed after a hearing by the examiner, because the record showed no deliberate overbooking, but only isolated oversale incidents arising from inadvertent overbooking and other circumstances beyond the carrier's control. *Eastern Air Lines Overbooking Enforcement Proceeding*, 30 CAB 862 (1960). In affirming the examiner's determination, the Board stated:

> In closing this proceeding, we believe it is appropriate to note our approval of the action of the Bureau of Enforcement in instituting this case. Manifestly, the reservations practices of the carriers have a widespread impact on the traveling public and require scrutiny to insure that the statutory standards of section 411 are being met. Our dismissal of the particular

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18 The Board took passing note of these enforcement proceedings in approving an industry agreement for a "no-show" program prescribing minimum time limits for purchase of tickets, reconfirmation requirements, and no-show penalties. *Air Traffic Conference of America No-Show Control Plan*, Order No. E-11658 (August 6, 1957). Acknowledging public criticism of airline oversales, the Board stated as follows:

> The oversale of space could result from several factors, including overbooking, which the Board earlier informed carriers would constitute a violation of the Act if done deliberately. There are now pending enforcement actions against two carriers which allegedly have engaged in this practice, and the Board intends to take whatever further steps may be appropriate to insulate the public from any such practices as it may find. (*Id.*)

> charges here involved is predicated upon the evidentiary record, and not upon any misgivings as to the need for the proceeding in the first instance. (*Id.* at 865.)

In the second case, *National Airlines, Inc., Enforcement Proceeding*, 31 CAB 390 (1960), the carrier admitted that it intentionally overbooked some flights, but claimed that the overall public interest was advanced, not harmed, by this practice. The examiner found that intentional overbooking was an unfair and deceptive practice, from which the carrier should be ordered to cease and desist. The Board, however, decided to terminate that proceeding without a final decision on the merits, opting instead to consider the questions from a broader industry-wide perspective. (*Id.* at 392.)

To gain that broader viewpoint, the Board contemporaneously issued its Order No. E-15615 (1960), instituting a proceeding entitled *Overbooking Practices of Trunkline Carriers*, Docket 11683. The purpose of this proceeding was not to discipline any carrier, but to elicit sufficient factual information so that the Board could adopt a sound regulatory policy for the future. The order noted that the agency was abandoning its earlier case-by-case approach because it was "found inadvisable to attempt to assess the overall problem on a piecemeal basis, with the delay and uncertainty which would arise from a series of decisions on partial records concerned with specific flights on individual carriers." (*Id.*) The prospect for swift adoption of an industry-wide approach to overbooking quickly evaporated, however, when virtually all of the major trunk lines filed information responses strongly denying the suggestion that they engaged in

deliberate overbooking.[19] Despite these denials, the agency staff concluded in a draft report on the basis of the information available that substantial overbooking, either inadvertent or intentional, was occurring and that a not insignificant number of passengers were being inconvenienced.

Instead of pursuing its *Overbooking Practices* investigation, the Board in 1961 authorized the trunk carriers to renew previously abandoned efforts to develop an acceptable no-show control plan.[20] In March, 1962, the CAB approved an industry plan calling for ticketing time limits and reservations charges, conditioned upon a provision granting compensation to passengers denied boarding under certain circumstances.[21] See *Domestic Trunkline No-Show Plan*, Order No. E-18064, 35 CAB 881 (1962). The approval order, however, made clear that the Board was not sanctioning overbooking:

19 See, *e.g.*, Information Responses filed in October, 1960 in CAB Docket 11683 by American (p. 3); Braniff (p. 3); Delta (pp. 17-18); Northeast (p. 11); Northwest (pp. 5-6); TWA (p. 12); United (p. 11). United, for example, asserted that its policy against confirming bookings in excess of capacity "is one of the Company's prime policies and its importance is stressed through all levels of management." National Airlines (p. 13) denied that it engaged in "systemwide" controlled overbooking, and emphasized its efforts to caution passengers when an oversold condition existed (p. 17). Allegheny, as a local service carrier, was not a party to this investigation and made no submission.

20 The no-show penalty plan approved in 1957, see note 18 *supra*, had been rescinded by the carriers in August, 1958, after less than a year's experience.

21 The compensation provision in this agreement was closely parallel to the denied boarding compensation provided for in the CAB's regulations which have been in effect since 1967. See 14 C.F.R. Part 250 (1975).

> The Board's action in making provision for payment to oversold passengers should not be construed as an indication that the Board condones deliberate oversales on the part of the air carriers. On the contrary, the proposed plan is designed to provide a measure of relief for passengers who are the victims of inadvertencies. Instances of intentional oversales will be fully investigated. (*Id.* at 882.)

The Board further emphasized that the common law remedies of passengers whose reservations were dishonored would remain intact, expressly rejecting an attempt to make the denied boarding compensation an exclusive or preemptive remedy:

> The carriers, by the terms of the agreement, would incorporate into the implementing tariff a provision which would preclude the oversold passenger from seeking further redress. Thus, the language in Section (D)(2)(a) provides, in effect, that the passenger must accept the prescribed penalty as full compensation for all damages. . . . [T]o the extent that the proposed tariff provision is designed to restrict a passenger from seeking damages to which he would otherwise be entitled under the common law, we find it to be adverse to the public interest. Accordingly, we shall condition our approval of the agreement to make clear that the prescribed penalty is a minimum obligation of the carrier which, only if accepted by the passenger, would terminate the carrier's obligation.

(*Id.* at 882-83.) (Footnote omitted.)[22]

Although the industry no-show penalty agreement expired in January, 1963, the trunk carriers filed tariffs continuing in effect the provision for denied boarding compensation which, if accepted by the passenger, constituted liquidated damages for dishonored reservations. The Board expressed its general approval of this approach, but urged that it be extended to all domestic airline travel. *Domestic Trunkline No-Show Plan*, Order No. E-20859, Docket 11327 (May 25, 1964). The Board also directed the participating carriers to adopt means of advising the public about the tariff provisions, specifically including "a clear statement to the effect that the passenger is under no obligation to accept the proffered compensation in lieu of any present or future claim against the carrier." (*Id.*)

In the same order, the agency announced that it would postpone further action in its investigation into *Overbooking Practices of Trunkline Carriers* (Docket 11683). It warned the carriers not to misconstrue its action:

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22 As one carrier noted in comments filed in the *Overbooking Practices* investigation, affirmative control by the CAB of reservations practices was not necessary, because of the availability of sufficient tort remedies at common law:

> The passenger has full and adequate protection, even without active Board regulation of booking practices. The "oversold" passenger has a good and legal cause of action to recover damages against a carrier who negligently (or willfully and falsely) advises him a seat is available when actually no seat is available.

Eastern Air Lines, Inc., Comments in CAB Docket 11683, p. 4 (Aug. 28, 1961).

> . . . we wish to make it clear that our decision to defer does not signify in any way sanction of overbooking or overselling practices. The option of the Board to take further action in the Overbooking investigation at any time such action is warranted should be clearly noted. (*Id.*)

Instead of pursuing that investigation, the Board planned to consider a rule specifying procedures for airlines to use in meeting an obligation which the Board said all carriers recognized – the need to notify passengers of overbooked conditions prior to the time of their scheduled departure.

Consideration of this more specific approach to the oversales problem began in October 1965, when the CAB proposed a rule requiring an airline to provide 12 hours advance notification to individual passengers who might be denied boarding on a particular overbooked flight, so that they might attempt to make alternate or contingent travel arrangements. *Notice of Proposed Rule Making, EDR-95*, 30 F.R. 13236 (1965). The notice explained that:

> . . . the payment of compensation to passengers does not provide a satisfactory alternative to the carriers' obligation to reduce to the maximum extent practicable the inconveniences to travelers. The protection of the traveling public requires that carriers give passengers with reserved space an adequate and reasonably timely notice where, as a result of an overbooked condition and under priority rules, they would be denied boarding if all passengers with higher priority boarded the flight. (*Id.*)

The proposal made it clear that notification would not relieve the carrier of whatever common law liability might arise from the denial of accommodation. Further, the Board said,

> [the proposed rule] does not condone or sanction intentional overbooking but is designed to discourage the use of deceptive practices and to reduce the injury or discomfort to passengers where the carrier fails to meet its reserved space commitments. The proposed provisions of §250.5 impose on the carriers the affirmative obligation to take special precautions as flight time approaches. (*Id.*)

In explaining why the rule was being proposed, the Board noted that although "the carriers all accept the obligation to advise passengers of overbooked conditions at some time prior to departure, the procedures for giving notice are not regularized, uniform, or publicly available." (*Id.*) It soon became apparent, however, that while the carriers professed a general sense of responsibility to give warnings to overbooked passengers, they were not willing to have it translated into this very specific, mandatory rule. They contended that the proposed uniform procedure would be costly, burdensome, confusing, counterproductive, and generally unworkable. In the face of unanimous industry opposition, the Board abandoned the advance notification proposal.

In January 1967, the Board announced a new proposal, which would address the problem of oversales in a different manner by endeavoring to reduce the number of incidents – then at the level of approximately 50,000 a year for the industry as a whole – and to assure more

adequate compensation when they did occur. *Notice of Proposed Rule Making, EDR-109*, 32 F.R. 459 (1967) (JA 170-94). The Board stated:

> The oversales problem . . . is a severe one. It causes distress, inconvenience and damage to passengers. It impairs the public image of air carriers, casting doubt on the integrity of their reservations practices. Clearly, it is incumbent on the Board and the carriers to do all within their powers to eliminate oversales to the extent feasible. (JA 173.)

However, the carriers had persuaded the CAB that *overbooking* was a relatively minor factor in the oversale problem, and that factors such as "free-sale" and "block ticketing" practices, substitution of smaller aircraft, human error, and equipment malfunctions accounted for most denials of boarding. (JA 175-76.) Rather than involve itself in the detailed regulation of air carrier reservation practices, either by imposing a complex notification system or by exercising its powers to prohibit overbooking outright, the Board again concluded in EDR-109 that the best approach would be to assure prompt, effective, and adequate monetary compensation to passengers denied boarding for whatever reason, and to exhort carrier managements to improve their systems. As the Board explained,

> . . . the reservations practices of the carriers involve detailed methods of doing business, personnel supervision, use of equipment, adaptation to technological change, etc., requiring a high degree of management flexibility and freedom. Since these matters are within the special province and competence of carrier management,

> it is desirable that the Board attempt to minimize to the extent possible regulation of the details of the carriers' reservations systems. But by the same token, it is incumbent on the carriers themselves to take effective steps to curb oversales resulting from their reservations practices. (JA 178.)

In August 1967, the Board adopted the Part 250 regulations, reaffirming its determination "to refrain from detailed regulation of the carriers' reservations policies." *Regulation No. ER-503, Enactment of Part 250,* 32 F.R. 11939 (1967) (JA 195-223.) The central feature of the CAB rule was the provision for compensation to passengers denied boarding, which the Board made clear was not to preclude pursuit of common law remedies unless the compensation was in fact accepted as liquidated damages. Passengers should not be forced to make an immediate decision as to whether or not to accept the tender of liquidated damages, the Board held, but "should instead be given the opportunity of making the election after the consequences of denied boarding have occurred and are known to them." (JA 211.)

Since 1967 the Board has on several occasions amended its regulations concerning denied boarding.[23] But it has

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[23] ER-588, 34 F.R. 14281 (1969) (providing for passenger's option to reject certain alternate transportation arrangements offered in lieu of denied boarding compensation); ER-681, 36 F.R. 7306 (1971) (providing for public disclosure of certain carrier data supplied under §250.10); ER-727, 37 F.R. 6924 (1972) (changing office designated to receive copies of carrier denied boarding priority rules and procedures); ER-804, 38 F.R. 14822 (1973) (amending definition of confirmed reserved space to include reservations (continued)

clearly and persistently rejected the option of trying to exercise close, uniform control over all carriers, choosing instead to give each carrier latitude to design and operate its own reservations system, consistent with its own tariff rules. At the same time, the Board has continued to be concerned that the particular practices employed by the carriers not deceive the public, and it has continued to view common law actions as providing bumped passengers with appropriate remedies in the alternative to denied boarding compensation. For example, in June 1973 the Board amended Part 250 to include foreign air carriers. In that proceeding, the Board again underscored its concern about the deceptive aspects of overbooking, noting that under Part 250, bumped passengers "are given the option to either accept denied boarding compensation as liquidated damages for all damages incurred by the passenger as a result of the carrier's failure to provide him with confirmed reserved space, or to pursue their remedy under the common law." *Notice of Proposed Rulemaking, EDR-248,* 38 F.R. 15083, 15084 (1973).

In sum, the CAB has never exercised its power under section 411 to ban overbooking outright, although it has threatened such action from time to time. Instead, after considering several possible alternatives, the agency has determined to avoid involving itself in the detailed regulation

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[23] (continued)
of space in any manner provided for in carrier's tariff); ER-827, 38 F.R. 27604 (1973) (expansion of applicability to include certain operations in Alaska); ER-880, 39 F.R. 38087 (1974) (expanding Part 250 applicability to include certain operations of foreign air carriers); see also PS-52, 38 F.R. 14823 (1973) (defining oral confirmation of reserved space to be unfair or deceptive practice where tariff provides only for written confirmation); PS-58, 39 F.R. 38905 (1974) (extending PS-52 to cover foreign air carriers).

of carrier reservations practices. Its decision seems to have been motivated in part by the monumental practical difficulties close regulation might entail and in part by a conviction that the public interest is better served if the Board allows carrier management maximum flexibility and room for innovation, while at the same time providing passengers with a choice of remedies that will encourage the carriers to eliminate deceptive or harmful elements from their systems. The Board has repeatedly made clear that carriers, if they overbook, do so at their own peril, and it has refused to sanction any such practices so as to shield them from whatever common law liability may arise from misrepresentations or dishonored reservations. *Compare, Hughes Tool Co. v. Trans World Airlines,* 409 U.S. 363 (1973).

The Board's entire regulatory program has been keyed to the notion that concurrent jurisdiction lies in the agency and in common law courts to deal with such problems. *Cf., Head v. New Mexico Board of Examiners,* 374 U.S. 424, 432 (1963); *Double-Eagle Lubricants, Inc. v. State of Texas,* 248 F.Supp. 515 (D. Tex. 1965), *appeal dismissed,* 384 U.S. 434 (1966). Thus, it is clear that there is no conflict whatever between petitioner's common law claims and CAB regulatory policies as developed over the past decade and a half. Nor do his claims interfere in any way with any policies the Board may wish to adopt prospectively for, as Senior Circuit Judge Fahy correctly pointed out in his dissenting opinion, whatever the court might decide regarding this case, the Board remains free to exercise its statutory powers to control future airline reservations practices in accordance with the policies of the Aviation Act. (Pet. App. A 53.)

II. THERE IS NOTHING EITHER EXPLICIT OR INHERENT IN THE AVIATION ACT THAT IS INCOMPATIBLE WITH ALLOWING PASSENGERS TO PURSUE THEIR COMMON LAW REMEDIES FOR DELIBERATE NONDISCLOSURE OF OVERBOOKING

In the court of appeals, respondent argued that the existence of section 411 was sufficient to oust the courts of jurisdiction to adjudicate claims for common law misrepresentation involving companies subject to CAB regulation. Thus, according to respondent, since the CAB had the power to ban overbooking as "unfair or deceptive" under section 411 of the Aviation Act, and even though it had not done so, petitioner's common law remedies for fraudulent misrepresentation were abrogated, and he was left without a remedy other than the denied boarding compensation which he had declined. The court of appeals rejected that broad claim of immunity, relying on the history and purpose of section 411 and the savings provisions of section 1106, which it found would have to be ignored in order to sustain respondent's position. (Pet. App. A 28-29.)

In so holding, the court of appeals was plainly correct. Initially it should be noted that nothing in section 411 – or any other provision of the Aviation Act for that matter – suggests that the powers granted to the CAB were intended to modify in any way traditional controls over deceptive practices under state common law or statute. See *American Airlines v. North American Airlines,* 351 U.S. 79, 83 (1956); *cf., Polansky v. Trans World Airlines, Inc.,* 523 F.2d 332, 337 (3d Cir. 1975); *Holiday Magic, Inc. v. Warren,* 357 F. Supp. 20, 28 (D.Wis. 1973), *vacated on other grounds,* 497 F.2d 607 (7th Cir. 1974).

Section 411 was modeled on section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45, as amended by the Wheeler-Lea Amendments of 1938. See *American Airlines v. North American Airlines*, 351 U.S. 79, 82 (1956); Hearings on Regulation of Transportation of Passengers and Property By Aircraft, Before A Subcommittee of the Committee on Interstate Commerce, U.S. Senate, 75th Cong., 1st Sess. 514 (1937) (Statement of E.S. Gorell, President of Air Transport Association of America). Since section 5 was intended to provide new and additional administrative remedies, not to assign to one small agency in Washington the exclusive role of determining for all purposes what is and what is not deceptive, *Federal Trade Commission v. Klesner*, 280 U.S. 19 (1929), section 411 must be construed in that light as well. This is particularly appropriate in view of section 1106 which provides that "Nothing contained in this Act shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this Act are in addition to such remedies." 49 U.S.C. § 1506. To rule that section 411 automatically preempts all common law remedies involving unfair or deceptive practices would be to override section 1106, and this the court of appeals correctly refused to do.

That refusal was appropriate for another reason as well. This Court has construed section 411 to apply only to those practices which the CAB decides are of broad public interest and not to every activity which might arguably be unfair or deceptive. *American Airlines v. North American Airlines, supra.* To interpret section 411 in the manner suggested by respondent would require the CAB to concern itself with all manner of trivial issues in order to assure that section 411's prohibition extended to any

conduct arguably within its ambit. Such a position would run counter to the broad public interest purpose of section 411.

Nonetheless, the majority of the court of appeals ruled that a damage claimant may not maintain a common law action against an airline for intentional, tortious misrepresentations, without first litigating before the CAB to determine whether the conduct is deemed "unfair or deceptive" under section 411. Thus, at least where a CAB-regulated company is concerned, the common-law standards of liability for fraud and deceit developed over the course of hundreds of years have been modified by the addition of a new, threshold test derived from federal legislation – namely, whether there has been a violation of section 411. If no such violation is found, it was held, the common law action would necessarily fail and the remedies otherwise available would be extinguished. (Pet. App. A31.)[24]

The court below seems to have correctly recognized that its holding involves a fundamental "alteration of the common law." (*Id.*) Indeed on its face it presents a square conflict with the savings provisions of section 1106, but the court held that section 1106 could not be read literally and must be examined in light of the remainder of the Aviation Act to determine whether the particular common law action survives, relying on *Texas & Pacific Ry. Co. v. Abiline Cotton Oil Co.*, 204 U.S. 426 (1907).

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[24] This result was reached by the court, *sua sponte*, and was not argued by any party or amicus including the CAB, on which the burden of conducting such proceedings would devolve.

(Pet. App. A31.) Petitioner does not dispute the general proposition that in some specific instances the overriding purpose and operation of a federal regulatory statute will be so inconsistent with the continuing vitality of a common law remedy that the remedy cannot survive, notwithstanding a provision such as section 1106; his position is simply that the facts of this case do not place it within the narrow group of cases to which that proposition applies.

The fundamental flaw in the approach of the majority below is that it focuses on the refusal of this Court in *Texas & Pacific Ry. Co., supra,* to apply a savings clause similar to section 1106, but fails to examine the special circumstances and reasons that led to that result. In that case a shipper sued for overcharges, claiming that the railroad had exacted an unreasonable rate in violation of the common law. The rate in question, however, was filed as required by the Interstate Commerce Act; the carrier was required to charge it and no other rate until it had been disapproved by the ICC or a new tariff had been accepted. Therefore, if a court were to hold the rate unreasonable, the carrier would be violating the federal law if he gave the shipper the court-awarded refund. Since this Court found that one of the primary purposes of the Interstate Commerce Act was to eliminate discrimination among shippers, and that to allow the common law remedy to survive would result in that very discrimination, albeit in a different form, this Court ruled that the retention of the common law action based on unreasonable rates would be "absolutely inconsistent" with the Interstate Commerce Act, so that the savings provision could not apply. "In other words, the act cannot be held to destroy itself." 204

U.S. at 446. Or as the Court said in an earlier portion of that opinion:

> a statute will not be construed as taking away a common-law right existing at the date of its enactment unless that result is imperatively required; that is to say, unless it is found that the pre-existing right is so repugnant to the statute that the survival of such right would in effect deprive the subsequent statute of its efficacy; in other words render its provisions nugatory. (*Id.* at 437.)[25]

Judged by that standard, it is apparent that the majority below was in error in its holding that petitioner's common law rights were necessarily altered by the Aviation Act. While it cannot be doubted that the effects of no-shows and overbooking may show up in a carrier's profit or loss column, that is true of virtually every aspect of its operations. That, therefore cannot be the touchstone

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[25] See also *Pennsylvania Railroad Co. v. Puritan Coal Mining Co.*, 237 U.S. 121, 129-30 (1915):

> That proviso was added at the end of the statute, not to nullify other parts of the act, or to defeat rights or remedies given by preceding sections, but to preserve all existing rights which were not inconsistent with those created by the statute. It was also intended to preserve existing remedies, such as those by which a shipper could, in a state court, recover for damages to property while in the hands of the interstate carrier; damages caused by delay in shipment; damages caused by failure to comply with its common-law duties, and the like.

for overruling section 1106 as the majority below suggested. (Pet. App. A30.) Similarly, deliberate and undisclosed overbooking is not a practice which is integral to respondent's rates and fares, since it is not set forth in any tariff and has never been required by the CAB to be filed under section 403(a). A practice which respondent has concealed from the public obviously stands on a very different footing from a publicly filed tariff insofar as section 1106 is concerned.[26]

Nor is this an area where uniformity is essential, so that retention of common law rights would be inherently repugnant to the Aviation Act. The best evidence of the absence of need for uniformity is the action, or more properly non-action, by the CAB each time it has considered the possibility of issuing uniform standards for

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26 The filing of tariffs insures that all parties are aware of the rules under which the carriers are operating, and section 403(a) of the Aviation Act requires that the carriers file tariffs showing the fares and rates to be charged, as well as such other "classifications, regulations, rules, practices and services in connection with such air transportation" as the CAB may require. Thus, while the CAB might have required the airlines to file information regarding their overbooking practices, it has not done so, and respondent has not chosen to do so voluntarily. The result is that the public has been kept entirely unaware of these practices and thus has been unable to guard against them. If Allegheny had filed an overbooking tariff, the public would have been on constructive notice thereof, and any challenge to the legality of its practice would have properly been raised in the first instance before the CAB. See *Danna v. Air France*, 463 F.2d 407 (2d Cir. 1972) and *Texas & Pacific Ry. Co. v. Abilene Cotton Oil Co., supra.* Having failed, however, to disclose its practices in its tariff filed at the CAB, the respondent cannot now seek insulation from the CAB from its liability for misrepresentation.

all carriers concerning their reservation practices. First, there is no requirement that carriers provide reservations for their flights (JA 117), and non-reservation services have been highly successful in some major markets (*e.g.*, the Eastern Air-Shuttle). Similarly, while most carriers now provide for confirmation of reservations by telephone, the CAB has repeatedly made clear that they are not obliged to do so, with the matter left entirely to the carrier's own judgment. See PS-52, 38 F.R. 14823, 14824 (1973); PS-58, 39 F.R. 38095, 38096 (1974).

Most importantly with regard to the overbooking question, the CAB has on numerous occasions considered proposals that would have taken the discretion from the airlines and established across-the-board standards that all the carriers would have to meet. Yet each time the Board has opted in favor of stimulating airline management to innovate and improve their reservation systems, rather than imposing a uniform, inflexible federal regime in this area. Plainly, this *laissez faire* attitude on the part of the CAB is wholly inconsistent with any claimed need for uniformity, and surely falls well below the standard of outright repugnancy established in the *Texas & Pacific* case as the test for overriding a specific savings clause such as section 1106.

Indeed this has been clearly demonstrated by an innovative approach conceived by Eastern Air Lines, which was approved in *Delta Air Lines, Inc. v. CAB*, 455 F.2d 1340 (D.C.Cir. 1971) (affirming CAB Order 71-6-120). Eastern's proposal provided for a system of limited overbooking in which passengers subject to a denial of boarding would be advised at the outset of their status, a status with both advantages (*e.g.*, the possibility of being

compensated if there is no space available) and disadvantages (e.g., the possibility of not being accommodated on the flight). A major benefit of this system, as the court of appeals noted in *Delta*, is that the passenger is fully apprised of all the facts, and it is entirely his own decision whether the arrangement offered is acceptable.[27] While this concept was originally approved for only a nine-month trial period, it is still in effect almost five years later on Eastern and has since been added by several other carriers. At a minimum the CAB's continuation of its permission to operate a different kind of reservations system demonstrates that uniformity is hardly essential in this area.

Finally, whatever may be said of the need for standardized reservations practices regarding overbooking, there is no purpose of the Federal Aviation Act of which we are aware that is fostered by the refusal of Allegheny and other carriers to disclose their practices to the public, let alone by their willful concealment in the face of direct inquiries about them. Unless it can be shown that Congress required the CAB to give paramount consideration to uniformity in all aspects of airline operations, it is difficult to imagine how a system which deludes more than 100,000 passengers annually into believing they have confirmed reservations, and then leaves them stranded at the gate, can be said to be so important to the aviation system in this

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[27] In a related context the Board has underscored the importance of full disclosure in connection with the confirmation of reserved space by telephone, concluding that "if the customer is told in clear and unmistakable language that his reservation is only tentative . . . we have no reason to believe . . . that the prospective passenger will be confused as to the status of his reservation." PS-52, 38 F.R. 14823, 14825 (1973).

country that it eliminates the common law remedies of those who are injured by it. Concealment and misrepresentation are plainly not essential ingredients in an airline reservation system, and there is utterly no public interest in insulating those who use such practices from damage actions under the common law. Accordingly, the majority below was in error in holding that section 411, either alone or in conjunction with other portions of the Aviation Act, requires a uniform policy, imposed by the CAB, for all reservation practices including concealed overbooking.

III. THE CIVIL AERONAUTICS BOARD HAS NO POWER TO INSULATE DELIBERATE NONDISCLOSURE OF OVERBOOKING BY AIRLINES FROM LIABILITY UNDER THE COMMON LAW, AND CERTAINLY COULD NOT DO SO RETROACTIVELY AS THE COURT OF APPEALS HELD.

In dictating that the trial court must refer petitioner's common law misrepresentation claim to the CAB for a determination of whether Allegheny's conduct was deceptive under section 411, the court of appeals has seriously misconceived that agency's functions and powers. This is not a case where petitioner bases his claim for damages on a violation of section 411, in which case the court would first have to decide whether any such cause of action existed[28] and then whether the tests of section 411 had been met. This case has not been referred to the CAB by the court of appeals in order to establish petitioner's right

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[28] *Cf. Polansky v. TWA, supra; Holloway v. Bristol-Myers Corp.*, 485 F.2d 986 (D.C. Cir. 1973).

to recovery, but rather to provide an opportunity for the agency to insulate the carrier from liability for its practices.

The appellate court's conclusion that the CAB could perform such a function arose from its belief that the Aviation Act "must be read broadly to include the approval in the public interest of some practices that might be considered common law misrepresentations." (Pet. App. A 30.) This, we believe, was a crucial misreading of that statute. Section 411 provides authority to the CAB *only* to investigate the practices of its regulatees and, when they are found to be unfair and deceptive, to issue cease and desist orders, and even this authority can be exercised *only* when the public interest so requires. Nothing in that section even purports to empower the agency to approve fraudulent misrepresentations that are otherwise actionable at common law. And to infer such authority from section 411 would turn its fundamental purpose – the protection of consumers from potentially deceptive acts or practices – on its head.[29]

Nor is there any other provision of the Act that authorizes the Board to approve intentional deceptions by an air carrier. To be sure, the agency has a legitimate concern in seeing that the companies it regulates make a reasonable return on their investment, but its general interest in

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[29] See *Federal Trade Commission v. Sperry & Hutchinson Co.*, 405 U.S. 233 (1972); *Federal Trade Commission v. Colgate-Palmolive Co.*, 380 U.S. 374 (1965); and *Holloway v. Bristol-Myers Corp.*, *supra*, as to the legislative history of section 5 of the Federal Trade Commission Act, upon which section 411 is based.

their profits and financial welfare can hardly be translated into a license for deceit. Concededly, some kinds of tortious misrepresentations might be of financial benefit to an airline, and such benefits might somehow be passed through to the public in lowered fares. Yet that would still be no basis to infer a sweeping power in the CAB to insulate such conduct from accountability at law to those injured by the deception – nor, it might be noted, has the agency ever claimed to have such a power. As Mr. Justice Cardozo wrote in *Federal Trade Commission v. Algoma Lumber Co.*, 291 U.S. 67, 78-79 (1934):

> But saving to the consumer, though it be made out, does not obliterate the prejudice. Fair competition is not attained by balancing a gain in money against a misrepresentation of the thing supplied. The courts must set their faces against a conception of business standards so corrupting in its tendency . . . . The careless and the unscrupulous must rise to the standards of the scrupulous and diligent. The Commission was not organized to drag the standards down.

That is not to say, however, that the CAB could never approve overbooking, for petitioner does not contend that overbooking is *per se* deceptive at all times and under all conditions. Indeed, when one carrier demonstrated that its proposed overbooking system would not be deceptive because all participants would be fully informed, its tariff regulations were quite properly approved and allowed to go into effect. *Delta Air Lines, Inc. v. CAB*, 455 F.2d 1340 (D.C.Cir. 1971). What is at issue here, however, is not just Allegheny's overbooking, but its deliberate concealment of that material fact in confirming petitioner's

reservation. That conduct is simply beyond the CAB's power to approve. *Cf. Aloha Airlines, Inc. v. Hawaiian Airlines, Inc.*, 489 F.2d 203, 211-212 (9th Cir. 1973), *cert. denied*, 417 U.S. 913 (1974).

Even assuming for the sake of argument that the court of appeals was right in inferring authority for the CAB to approve fraudulent conduct and shield it from future liability, the concept that it could do so *retroactively* – issuing ad hoc determinations after injuries have already occurred to extinguish any cause of action – cannot be supported. Even where the agency has been given express power to insulate particular conduct from liability under the antitrust laws, this is not done on a retroactive basis.[30] In *Hughes Tool Co. v. Trans World Airlines*, 409 U.S. 363 (1973), for example, this Court held that a private antitrust suit for damages could not proceed where the CAB had actually taken jurisdiction over and approved the transactions and relationships which were at the heart of the controversy. If the agency had declined to approve the transactions or to exercise its regulatory jurisdiction, it is inconceivable that this Court would have felt it appropriate to send the case back to see whether the Board might want to give retroactive approval. Whatever immunizing powers the Board may have in these areas is inherently prospective, not retroactive in nature. See *Pan American World Airways*

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30 Under the CAB's "Sherman Doctrine", the Board's policy is to refuse retroactive approval to otherwise illegal relationships with and between air carriers except in emergency and *de minimus* situations. *Sherman Control and Interlocking Relationships*, 15 CAB 876 (1953).

v. United States, 371 U.S. 296, 305 (1963); *Aloha Airlines, Inc. v. Hawaiian Airlines, Inc., supra.*

The CAB's powers are broad, but not limitless. The fact that the court of appeals might think that the agency should have the power to approve affirmative misrepresentations "in the public interest" in the manner contemplated by its decision is irrelevant, for the Board's powers are necessarily limited to those assigned it by Congress. *Civil Aeronautics Board v. Delta Air Lines*, 367 U.S. 316, 322 (1961). And those powers do not include those inferred by the majority below.

IV. ALL DOUBTS ON THE QUESTIONS OF STATUTORY INTERPRETATION SHOULD BE RESOLVED AGAINST THE DECISION BELOW, BECAUSE IT DISRUPTS THE ALLOCATION OF FUNCTIONS BETWEEN THE COURTS AND THE CIVIL AERONAUTICS BOARD.

Since this Court's decision in *American Airlines v. North American Airlines*, 351 U.S. 79 (1956), it has been clear that the powers of the CAB under section 411 are to be exercised only as a means of vindicating the public interest, and not to adjudicate the rights and liabilities of parties in private disputes. As Senior Judge Fahy correctly noted in his dissent, section 411 "looks only to the future cessation of practices determined by the Board to be unfair or deceptive," having nothing whatever to do with remedies "for past tortious conduct of a carrier injurious to an individual." (Pet.App. A 51.) The courts of law, rather than the regulatory agencies charged with the protection of the overall public interest, are available for

the resolution of private controversies involving air carriers.[31]

The court of appeals has sharply departed from that rule. Its holding that damages may not be awarded against a regulated airline for its past tortious acts, without first referring the matter to CAB for a ruling as to whether the conduct is deemed unfair or deceptive under section 411, will deeply affect the historic relationships between federal agencies and courts throughout the nation – not only the federal courts, but state and local courts as well. The decision effectively withdraws from judicial bodies at every level their traditional role in adjudicating private tort claims under both the common law and specific statutes, and reassigns an important part of that job to a federal administrative agency. Yet the circuit court never mentioned and apparently did not even consider the effect its decision would have on these important functional divisions of responsibilities as between the state and federal courts and the federal regulatory agencies.[32]

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31 See *North American Airlines, supra,* 351 U.S. at 83. See also *Cort v. Ash,* 422 U.S. 66 (1975), in which this Court admonished that federal regulatory statutes should not be construed as intruding into those areas traditionally committed to state law, such as the resolution of individual claims for damages, unless essential to their central purposes. See also *Polansky v. Trans World Airlines, Inc.,* 523 F.2d 332, 337 (3d Cir. 1975).

32 While the particular decision here involves only the airline industry and its relationship to the CAB, the logic of the majority's holding would appear to be equally applicable to other regulatory agencies and other regulated industries. Thus, if the appellate court were correct as to the immunizing effect of a determi-
(continued)

Moreover, the court of appeals has seriously misconstrued the Board's role under section 411 as illuminated by this Court's *North American Airlines* decision. The existence of unfair or deceptive practices in the airline industry does not automatically trigger investigations, cease and desist proceedings, or other adjudications before the Board; only when the Board – *not* the court of appeals – makes a specific determination that the public interest requires the use of its section 411 powers does that provision come into play. 351 U.S. at 85. The decision below simply ignores the fact that it is the agency's duty to decide whether and when these powers should be invoked, in effect forcing from the Board an adjudication of whether certain carrier practices should be condemned or approved on an industry-wide basis.

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32 (continued)
nation by the Board that a particular practice is not deceptive under section 411, a similar determination by the Federal Trade Commission that certain conduct is not deceptive under section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45, would likewise seem to extinguish any common law liability for such conduct. By the same token, the Securities and Exchange Commission would seemingly have authority under sections 10(b) and 14(a) of the Securities and Exchange Act, 15 U.S.C. §§ 78j(b), 78n(a), to retroactively sanction and immunize the use of statements in the sale of securities or in proxy materials that would be misleading under state law. In either case, actions in state or federal courts seeking damages for misrepresentation would have to be stayed pending referral to the federal agency – a result certainly hard to square with this Court's decision in *J.I. Case Co. v. Borak,* 377 U.S. 426 (1964), or with the D.C. Circuit's decision in *Holloway v. Bristol-Myers Corp., supra.*

As the Board's actions in the area of reservations practices demonstrate, many factors go into its determination of whether, and if so, how to regulate any particular matter – including limitations on its own available resources, the difficulties involved in regulation, the availability of other forms of relief for affected persons (such as suits at common law), and many other variables. This careful balancing would be entirely undone by the reallocation of functions mandated by the court below.

As a practical matter this agency can deal with no more than a handful of section 411 proceedings each year; yet the decision below would thrust upon it referrals from local, state and federal courts throughout the country to pass upon the incredible variety of claims filed against regulated companies – not only airlines, presumably, but travel agents, tour operators, freight forwarders and other "indirect air carriers" – that arguably fall within the concept of unfair or deceptive practices under section 411. A determination by the Board on any of these would require full adjudicatory hearings, and the decision would have to be supported by substantial evidence – followed, presumably, by judicial review proceedings in which the agency would have to defend its decision. (Pet. App. A 30.) For an agency which already has severe difficulties in processing its workload,[33] such an additional burden would be disastrous.

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[33] See, *e.g.*, E. Wolff, *et al.*, Report of the Civil Aeronautics Board Advisory Committee on Procedural Reform, pp. 5-9 (1975); J. Landis, Report on Regulatory Agencies to the President-Elect (1960).

The implications of this decision and the fundamental changes it would bring about in the respective allocations of decisional powers among courts and agencies are extensive and various. Thus, it would seem that a private party who was unable to generate interest directly at the CAB in taking up his particular cause under section 411 would now have an indirect avenue to compel the agency to consider the matter – simply file a damage action under common law tort theory and await "referral" to the Board as mandated here by the court of appeals. Surely this was not how the statute was designed to operate. *Cf. Federal Trade Commission v. Klesner,* 280 U.S. 19, 25 (1929). In short, the unprecedented decision of the circuit court will have an enormously disruptive impact on both courts and agencies, not to mention litigants. That kind of change must be made by Congress, not the courts.

CONCLUSION

For the foregoing reasons, the decision of the court of appeals requiring referral of petitioner's common law claim to the Civil Aeronautics Board should be reversed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-455

RALPH NADER, *Petitioner,*

v.

ALLEGHENY AIRLINES, INC., *Respondent.*

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF FOR RESPONDENT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-455

RALPH NADER, *Petitioner,*

v.

ALLEGHENY AIRLINES, INC., *Respondent.*

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF FOR RESPONDENT

QUESTION PRESENTED

Whether the Court of Appeals deviated from well established principles of the doctrine of primary jurisdiction by conditioning petitioner's tort claim on a finding by the agency statutorily charged with regulating the allegedly tortious activities that those activities are not sanctioned by the regulatory scheme.

STATUTES INVOLVED

Sections 102, 404(b), 411 and 1002(e) of the Federal Aviation Act of 1958, as amended, 49 U.S.C. §§ 1302, 1374(b), 1381, and 1482(e), provide:

Section 102. [49 U.S.C. § 1302.] In the exercise and performance of its powers and duties under this chapter, the Board shall consider the following, among other things, as being in the public interest, and in accordance with the public convenience and necessity:

(a) The encouragement and development of an air-transportation system properly adapted to the present and future needs of the foreign and domestic commerce of the United States, of the Postal Service, and of the national defense;

(b) The regulation of air transportation in such manner as to recognize and preserve the inherent advantages of, assure the highest degree of safety in, and foster sound economic conditions in, such transportation, and to improve the relations between, and coordinate transportation by, air carriers;

(c) The promotion of adequate, economical, and efficient service by air carriers at reasonable charges, without unjust discriminations, undue performance or advantages, or unfair or destructive competitive practices;

(d) Competition to the extent necessary to assure the sound development of an air-transportation system properly adapted to the needs of the foreign and domestic commerce of the United States, of the Postal Service, and of the national defense;

(e) The promotion of safety in air commerce; and

(f) The promotion, encouragement, and development of civil aeronautics.

Section 404(b). [49 U.S.C. § 1374(b).] No air carrier or foreign air carrier shall make, give, or

cause any undue or unreasonable preference or advantage to any particular person, port, locality, or description of traffic in air transportation in any respect whatsoever or subject any particular person, port, locality or description of traffic in air transportation to any unjust discrimination or any undue or unreasonable prejudice or disadvantage in any respect whatsoever.

Section 411. [49 U.S.C. § 1381.] The Board may, upon its own initiative or upon complaint by any air carrier, foreign air carrier, or ticket agent, if it considers that such action by it would be in the interest of the public, investigate and determine whether any air carrier, foreign air carrier, or ticket agent has been or is engaged in unfair or deceptive practices or unfair methods of competition in air transportation or the sale thereof. If the Board shall find, after notice and hearing, that such air carrier, foreign air carrier, or ticket agent is engaged in such unfair or deceptive practices or unfair methods of competition, it shall order such air carrier, foreign air carrier, or ticket agent to cease and desist from such practices or methods of competition.

Section 1002(e). [49 U.S.C. § 1482(e).] In exercising and performing its powers and duties with respect to the determination of rates for the carriage of persons or property, the Board shall take into consideration, among other factors—

(1) The effect of such rates upon the movement of traffic;

(2) The need in the public interest of adequate and efficient transportation of persons and property by air carriers at the lowest cost consistent with the furnishing of such service;

(3) Such standards respecting the character and quality of service to be rendered by

air carriers as may be prescribed by or pursuant to law;

(4) The inherent advantages of transportation by aircraft; and

(5) The need of each air carrier for revenue sufficient to enable such air carrier, under honest, economical, and efficient management, to provide adequate and efficient air carrier service.

STATEMENT OF THE CASE

A. The Facts

This action arises from petitioner Nader's failure to obtain a seat on Allegheny Airlines Flight 864 from Washington, D.C., to Hartford, Connecticut, on April 28, 1972. Nader arrived at the gate sometime after 10:05 a.m. for the 10:15 a.m. flight (JA 35-36) and learned that all of the seats were occupied by reservations-holding passengers. JA 77-79. Nader was denied boarding on the Allegheny flight because he arrived at the gate later than all of the other Washington passengers that the flight could accommodate. (*Id*).

Despite the fact that he held a ticket and a reservation, Nader could not be boarded on Allegheny's flight because the flight had been "oversold," a rare consequence of an industry-wide practice of "overbooking" designed to ameliorate the harmful effects of late cancellations and "no-shows"—reservations-holding passengers who do not appear at flight time (hereinafter collectively referred to as "no-shows"). JA 66-70, 170-223.

If airlines did not overbook—that is, accept more reservations for a flight than the flight's capacity—

all flights would depart partially empty because of no-shows. JA 66-70, 170-223. Accordingly, airlines, including Allegheny, continually make statistical studies of the pattern of no-shows for each flight and accept a number of reservations in excess of the flight's capacity based on the number of no-shows that computer analysis of the flight indicates will occur. JA 170-223.

The purpose of Allegheny's statistical analysis of no-shows, and its consequent overbooking, is to ensure that each of its flights will depart with as few empty seats as possible. JA 124. Despite close statistical studies of each flight, every one of which is analyzed periodically, many of Allegheny's fully-booked flights customarily depart with empty seats.

On rare occasions, if actual no-shows for a flight deviate widely from the statistical pattern, more ticket-holding passengers will arrive for a flight than the flight can accommodate. Consequently, some passengers who have come to the airport with tickets will be denied boarding on the flight. These passengers are called "oversales."

The Civil Aeronautics Board (hereinafter "CAB"), which regulates Allegheny and other airlines pursuant to the Federal Aviation Act of 1958 (JA 2, 8), has examined extensively the airline industry's overbooking practices in a series of proceedings over many years. Pet. App. A8-A14. The CAB has not deviated from the conclusion it reached in 1967 that the reservations practices of the airlines, including overbooking and the occasional consequent oversales, have, "on balance, worked reasonably well in the public interest * * *." JA 174.

The CAB, recognizing the necessity of overbooking, determined not to ban it but instead instituted a system of denied boarding compensation to make whole the relatively few passengers who become "oversales."

> [T]he present reservations system of the carriers is designed to provide maximum benefits for the traveling public and to reduce the carriers' reservations costs. However, these ends are achieved at a price of substantial inconvenience and hardship to those *relatively few passengers* who are oversold and denied boarding although holding confirmed reservations. * * *
>
> [W]e shall permit the above described reservations practices to continue without regulation on condition that the carriers file tariffs providing prompt, effective and adequate compensation to denied boarding passengers, as proposed herein. [JA 180, 182; emphasis added; footnote deleted.]

The risk to the airline-traveling public of becoming an "oversale" is very slight indeed. From 1969 through 1973, which includes the period of Nader's denied boarding, 99.94% of all reservations confirmed by the carriers in domestic air transportation were honored. *Emergency Reservations Practices Investigation*, Initial Decision (CAB Docket 26253, June 10, 1974) (hereinafter "Initial Decision") at 29. The remaining .06% included reservations dishonored for a variety of reasons, such as substitution of equipment and government requisition, and not oversales alone. In the most recent three-year period for which statistics are available, Allegheny has performed better than the industry average in its number of denied boardings for all reasons, including oversales. The figures below are the number of denied boardings per 10,000 passengers enplaning.

	Industry	Allegheny
1972	5.4	6.3
1973	4.6	4.5
1974	5.8	4.6 [1]

In the same proceeding in which the CAB instituted denied boarding compensation, it *considered and rejected* a proposed rule that would have required airlines to advise passengers that they could become "oversales" on overbooked flights. The CAB agreed with the carriers that such disclosure would be contrary to the public interest in that it would, among other things, (1) create anxiety and confusion on the part of the traveling public, (2) cause travelers to make a great number of duplicative and protective reservations, (3) produce a rapid turnover of reservations within 24 hours before the departure of a flight, and (4) increase the no-show problem. Pet. App. A10; JA 173-174.

After Nader was denied boarding on April 28, 1972, Allegheny offered him, pursuant to CAB regulations, denied boarding compensation in the amount of $32.41 and alternate air transportation to Hartford scheduled to arrive 55 minutes after the flight on which he could not be accommodated. JA 169, 79-81. Nader declined both offers and chose instead to bring suit.

B. The Decisions Below

Nader's intent in asserting his claim against Allegheny was not to be made whole for any tortious injury that might have occurred to him, but rather

[1] Pet. App. A7; CAB, Bureau of Operating Rights, "Passengers Denied Confirmed Space, Calendar Years 1974 and 1973," at App. A and App. B (March, 1975).

to force Allegheny to cease its practice of overbooking flights. Nader's lawyer wrote to Allegheny before suit was filed to this effect as follows:

* * *

> Recent CAB statistics reveal that the airline industry is apparently unwilling to take the steps necessary to eliminate the oversales of their flights, a problem which has plagued consumers for many years and which remains a matter of serious public concern.[2]
>
> If you are interested in discussing the settlement of this matter before the complaint is filed, please let me knew before June 23, 1972. We anticipate that any such settlement would include an assurance on Allegheny's part that it would take immediate steps to eliminate overbooking and oversales. [JA 169.]

When settlement on these terms was not accomplished, Nader brought suit against Allegheny in the United States District Court for the District of Columbia seeking, together with a co-plaintiff, $250,000 in compensatory and punitive damages. JA 6-7. An award of that amount, or of any lesser but nevertheless substantial amount, would be tantamount to achieving Nader's objective of an injunction against overbooking. Allegheny, or any other airline, could not afford to pay such an amount to each oversold passenger.

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[2] Nader, the nation's premier consumer advocate, claims that he was totally unaware prior to April 28, 1972, of airlines' overbooking (Brief for Pet. at 6-9), despite his lawyer's statement a month and a half later that airline oversales were "a problem which has plagued consumers for many years" (JA 169) and despite the fact that Nader had been denied passage on flights on two prior occasions by other airlines. Brief for Pet. at 6.

Nader and his co-plaintiff, Connecticut Citizen Action Group (hereinafter "CCAG"), a consumer group for whom he was scheduled to speak on the day of his abortive flight, claimed in their complaint that Allegheny was liable to them under the antidiscrimination provision of the Federal Aviation Act of 1958, 49 U.S.C. § 1374(b) (1970), and under common law tort principles of misrepresentation, for failing to disclose Allegheny's overbooking practices.

After a trial to the court, Judge Charles Richey entered a judgment for Nader on both the antidiscrimination and misrepresentation claims and awarded him $10 in compensatory damages and $25,000 in punitive damages. The Court also entered a judgment for CCAG on its misrepresentation claim and awarded it $51 compensatory damages and $25,000 in punitive damages. Pet. App. B10-B11.

On review by the United States Court of Appeals for the District of Columbia Circuit, in which Allegheny was supported by amicus briefs of the CAB and the Air Transport Association of America, that court reversed the District Court and remanded the case for further proceedings.

With respect to the District Court's judgment for Nader on the antidiscrimination claim, the Court of Appeals held that the lower court made errors of law and clearly erroneous findings of fact, and it remanded that portion of the case with directions to make new findings of fact and conclusions of law and to reopen the record if necessary. Pet. App. A14-A24, A49-A50. Because the Court of Appeals found no record evidence of malice or wanton conduct on behalf of Allegheny, and because it found that it was improper to

use punitive damages to deter other members of a regulated industry from conduct within the ambit of regulation, the court held that no punitive damages could be awarded as a matter of law on Nader's misrepresentation claim. *Id.* at A49-A50. Review is not sought here by Nader of these portions of the Court of Appeals' judgment.

The Court of Appeals further held that co-plaintiff CCAG could not recover from Allegheny on its claim of misrepresentation because it was not within the class of persons whom Allegheny had reason to expect might act in reliance on its statements, and the court reversed the judgment for CCAG. Pet. App. A40. That portion of the Court of Appeals' decision is likewise not before the Court.

With respect to the judgment for Nader on his claim of fraudulent misrepresentation, the Court of Appeals reversed as clearly erroneous the District Court's finding that Allegheny affirmatively misrepresented to Nader that he had a guaranteed reservation for a seat. Pet. App. A26. This ruling is not here on appeal. The court held that Nader had not proved Allegheny liable to him for the tort of misrepresentation. Rather, the court found that Nader's claim, if any, was for nonrepresentation—*i.e.*, for allegedly not disclosing that there was a risk of being an oversale on an overbooked flight. Pet. App. A25-A26. The court held that before the District Court could consider that claim, it must, pursuant to "an application of the principles of primary jurisdiction," stay its proceedings until the CAB had spoken, in a proceeding that the CAB is currently conducting, on the issue of whether Allegheny's alleged nondisclosure of its overbooking practices was "deceptive" or "unfair" within

the provisions of § 411 of the Federal Aviation Act, 49 U.S.C. § 1381 (1970). Pet. App. A32, A37. The court further held that the CAB's mandate to effectively regulate the airline industry in the public interest (pursuant, *inter alia*, to 49 U.S.C. §§ 1302 and 1482(e) (1970)) requires that if the agency finds Allegheny's overbooking practices not to be deceptive or unfair, then those practices as a matter of law cannot constitute common law misrepresentation. Pet. App. A30.

If, however, the CAB finds Allegheny's practices to have been deceptive or unfair and not part of the approved regulatory scheme, the Court of Appeals directed the District Court to determine whether Nader could recover for Allegheny's alleged nonrepresentation. Pet. App. A26, A31 n.40. The Court of Appeals ruled that in any further proceedings, Allegheny should not be held to a standard of full disclosure as a fiduciary, as the District Court had erroneously decided. Pet. App. A49. The District Court was also directed to consider, in determining the issue of punitive damages in the event Nader was permitted to recover on his tort claim, whether Allegheny had a good faith defense by its reasonable belief at the time of the occurrence that its overbooking policies were lawful and approved by the CAB. Pet. App. A48-A49.

Senior Judge Fahy concurred in those portions of the Court of Appeals' opinion which remanded Nader's antidiscrimination claim, which held that no punitive damages could be awarded on that claim, and which held that CCAG was not within the class of persons who could recover from Allegheny for the tort of fraudulent misrepresentation. Judge Fahy dissented from the majority's application of the doctrine

of primary jurisdiction to Nader's fraudulent misrepresentation claim. He argued that the claim was "ripe for review" by the Court of Appeals without recourse to the CAB and that a CAB finding that Allegheny's reservations and overbooking practices were not deceptive was no bar to Nader's possible recovery on that claim. Pet. App. A50-A60.

Thus, in light of the portions of the Court of Appeals' opinion not here on appeal, the most Nader can recover on his antidiscrimination claim on remand is $10 compensatory damages. If the fraudulent misrepresentation claim is retried, it is unlikely that Nader could recover punitive damages in view of Allegheny's defense, which the Court of Appeals was clearly correct in allowing (Pet. App. A48-A49), that Allegheny "reasonably believed that its policies were completely lawful and in fact carried the approval of the Board." See Argument I, *infra*.

C. The Remaining Proceedings

As the preceding discussion demonstrates, there are proceedings remaining in this case both at the trial and administrative levels.

The District Court on remand was directed by the Court of Appeals to resolve three factual issues, by reopening the trial record if necessary, on Nader's claim on the antidiscrimination provision of the Federal Aviation Act. The District Court was asked to resolve: whether Allegheny's own operations manual properly established denied boarding priority rules, as it is required to do by CAB regulations; what those rules were and whether they were properly interpreted by Allegheny's agent; and whether the agent's testimony was credible in light of certain documentary evidence. Pet. App. A24. The resolution of these issues, while nominally directed to the antidiscrimination claim, might bear as well on a rehearing of the fraudulent misrepresentation claim, if one is held. Particularly, findings on the issues would go to whether Allegheny intended to deceive Nader or knew that its conduct was materially misleading, two elements of the tort of fraudulent misrepresentation. Brief for Pet. at 14 n.11; *Sankin* v. *5410 Connecticut Avenue Corp.*, 281 F. Supp. 524, 545 (D.D.C. 1968), *aff'd sub nom., Benn* v. *Sankin*, 410 F.2d 1060 (D.C. Cir. 1969), *cert. denied*, 396 U.S. 1041 (1970); RESTATEMENT OF TORTS § 529 (1938). Further, resolution of the remanded issues might also affect Allegheny's defense to the imposition of punitive damages on the misrepresentation claim that the District Court was directed to consider, *i.e.*, whether Allegheny reasonably believed that its overbooking practices had been approved by the CAB. Pet. App. A48-A49.

There are also further proceedings on the administrative level. The Court of Appeals, in an "application of the principles of primary jurisdiction" (Pet. App. A32), directed the District Court to defer further consideration of Nader's misrepresentation claim until the CAB had spoken on the issue of whether Allegheny's failure affirmatively to disclose its overbooking practices was deceptive or unfair. Pet. App. A50. After noting that the CAB in 1967 had ruled that airlines *need not disclose* the overbooked condition of their flights to prospective passengers (Pet. App. A10), the court found that the CAB was again considering the fairness and reasonableness of airlines' overbooking practices, that an administrative

law judge had initially found the overbooking practices not to be deceptive, and that this decision was on review by the full CAB. Pet. App. A33-A37.

As a consequence of the Court of Appeals' decision, the CAB announced on July 11, 1975, in Order 75-7-54, that it was soliciting comments on how best to determine whether air carriers' information policies with respect to their overbooking practices have been unfair or deceptive. *Emergency Reservations Practices Investigation,* Order No. 75-7-54, 40 Fed. Reg. 30150 (1975).

If the CAB determines that Allegheny's overbooking practices are deceptive and not part of the approved regulatory scheme, then, pursuant to the Court of Appeals' decision (Pet. App. A31), Nader's claimed tort of fraudulent misrepresentation will be tried before the District Court, and the question presented by the instant writ—the immunization of a common law tort by a regulatory agency—will be moot.

SUMMARY OF ARGUMENT

The extremely narrow issue presented by petitioner is whether the particular facts of this case present one of the "specific instances" conceded by him to warrant the subordination of a common law claim to regulation by the CAB. In Part I, we demonstrate that petitioner has confused "oversales," which neither Allegheny nor any other airline engages in intentionally, with "overbooking," which the airlines do engage in and which the CAB has said works to the public's benefit. Overbooking is designed to prevent flights from departing with empty seats because of people who make reservations but then fail to appear

for those flights. This overbooking is carefully and statistically monitored for each flight so as to *prevent* oversales. The CAB not only has found overbooking advantageous to both carriers and prospective passengers but has designed an elaborate scheme of rules and criteria for dealing with it and with the rare oversale that may result from it. Thus, carriers must report oversales, provide boarding compensation for "bumped" passengers, establish priorities for those denied boarding, etc. Even more significantly, the CAB has considered and *rejected* a proposal that passengers be informed in advance of their flights that they could become oversales, pointing out, among other things, the terrible anxiety and confusion on behalf of passengers that would result. Thus, the CAB has investigated and regulated—and continues to do so in a current investigation—the very conduct for which petitioner seeks damages in the courts.

In Part II, respondent shows that this is precisely the kind of case where the issue (the deceptiveness and validity of respondent's overbooking practies) should be decided *vel non* by the agency which regulates those practices. The CAB has the expertise to balance all the competing interests in this difficult field. This is particularly important where rates are affected, as the CAB has noted is true in this case. The necessity for uniformity is demonstrated by the kind of situation which would result if some airlines were forced by court rulings or jury awards to disclose overbookings while others were silent on the subject.

In Part III, we demonstrate that the doctrine of exclusive primary jurisdiction is properly applied here where the courts would merely be deferring the question of respondent's overbooking practices to the

CAB for sanction or disapproval. If the CAB sanctions such practices, it would violate every concept of the primary jurisdiction doctrine, and would completely disrupt this regulated industry, to allow passengers to recover substantial awards in court based on the very practices that have been sanctioned by the regulatory agency. The two-fold answer to petitioner's argument that the CAB cannot retroactively declare practices legal and valid is that (a) the CAB, when it rules here in the exercise of its primary jurisdiction, will merely be declaring what its policy has been all along, and (b) even if this turns out not to be the case, the doctrine of primary jurisdiction fully allows an agency to declare practices legal and valid retroactively, and they have frequently done so with court approval.

ARGUMENT

I. THE CAB, AFTER SCRUTINIZING AIRLINE OVERBOOKING, HAS PERMITTED THAT PRACTICE AND HAS FOUND THAT DISCLOSURE OF THE PRACTICE IS NOT IN THE PUBLIC INTEREST.

The question presented by petitioner is extremely narrow. He does not contend that the Federal Aviation Act in all instances saves common law remedies. He merely argues that the accepted doctrine of primary jurisdiction does not apply to the specific facts of this case. His Brief states:

> Petitioner does not dispute the general proposition that in some specific instances the overriding purpose and operation of a federal regulatory statute will be so inconsistent with the continuing vitality of a common law remedy that the remedy cannot survive, notwithstanding a provision such as section 1106 [the common law rights savings clause]; his position is simply that the facts of this case do not place it within the narrow group of cases to which that proposition applies. [Brief for Pet. at 40.]

Thus, the penumbral issues of the case and most of the issues that were before the trial court have disappeared. This is no longer a case of whether a nonpassenger third party—CCAG—can recover for the noncarriage of Nader. This is not a case of whether Nader can recover under the antidiscrimination provision of the Act or whether he can collect punitive damages. Nor is this a case of whether overbooking is legal or whether the CAB has the authority to regulate overbooking. The only question before the Court is whether the facts of this case present one of the "specific instances" conceded by Nader to warrant the subordination of a common law claim to the regulatory scheme.

The tenor of Part I of petitioner's Argument is that the CAB has never sanctioned airlines' overbooking practices. This is not so. The CAB has explicitly stated that overbooking is a necessity in light of the no-show problem and that the combination of controlled overbooking and tariff-directed compensation to the rarely oversold passenger is the optimum and fairest method of dealing with the problem.

Petitioner's misapprehension of what the CAB has done may be explained by his continued confusion of the terms "overbook" and "oversale." An understanding of these terms is crucial; while airlines engage in controlled and planned overbooking, they do not deliberately oversell any flights. Oversales are in-

advertent statistical aberrations that occur in the actuarial system of overbooking.

This confusion in terminology was even evident at the trial, as this exchange with Allegheny's expert witness demonstrates:

> The Witness: * * * You used the word "overselling" and not "overbooking". I assume you are using that distinction intentionally.
>
> By Mr. Robertson [Nader's counsel]:
>
> Q. I am not aware of a distinction.
>
> A. Well, an overbooking relates to the practice in the reservation system of placing—of accepting more reservations that you have seats in inventory. But if the system works at all, there are very few, if any, oversales. [JA 66.]

The confusion persists. In discussing a 1962 CAB order dealing with denied boarding compensation, petitioner's Brief states as follows:

> The approval order, however, made clear that the Board was not sanctioning *overbooking*:
>
> > The Board's action in making provision for payment to *oversold* passengers should not be construed as an indication that the Board condones *deliberate oversales* on the part of the air carriers. On the contrary, the proposed plan is designed to provide a measure of relief for passengers who are the victims of inadvertencies. Instances of *intentional oversales* will be fully investigated. [Brief for Pet. at 28-29; emphasis added.]

Obviously, the Board's language relied on by Nader to support his proposition that the Board has not sanctioned overbooking does no such thing. The Board

is saying that deliberate and intentional *oversales* cannot be condoned. Allegheny takes no issue with this statement because it never intentionally oversells any of its flights. Furthermore, the statement has nothing to do with this case. Nader has at no time claimed, and there is no evidence to support the claim, that he was an intentional or deliberate oversale. He was the victim of a statistical aberration and nothing more.

With this confusion out of the way, the CAB's policy with respect to overbooking is clear. This position is well summarized in a 1973 CAB notice:

> In the original rulemaking promulgating Part 250 (EDR-109, dated Jan. 10, 1967 and ER-503, adopted Aug. 3, 1967) the Board found that a certain degree of overbooking was inherent in the air carriers' reservations systems, but that such controlled overbooking usually worked to the advantage of both the air carrier and its prospective passengers. However, while we felt that these reservations systems have, "on balance, worked reasonably well in the public interest," we also concluded that the public interest required those passengers who were denied boarding because of oversales be reasonably compensated for the distress, inconvenience and damage which they suffered as a result of such denied boarding. [*Notice of Proposed Rulemaking,* EDR 248 at 5, 38 Fed. Reg. 15083 (1973).]

The CAB's regulation of what it perceives to be the adverse consequence of overbooking has been pervasive and detailed. Its regulations are the result of continued scrutiny over many years of the carriers' reservations and overbooking practices, as Nader's partial recitation at pages 24 through 36 of his Brief demonstrates. The regulations, which have remained

unchanged from the time of Nader's denied boarding, include the following:

—"Each carrier shall establish priority rules and criteria for determining which passengers holding confirmed reserved space shall be denied boarding *on an oversold flight*". These rules are to be filed with the CAB, where they are publicly available.[3] 14 C.F.R. § 250.3; emphasis added.

—Each carrier shall file a tariff providing for denied boarding compensation to passengers who are "bumped" under certain circumstances. 14 C.F.R. § 250.4.

—Each carrier shall tender to the passenger eligible for denied boarding compensation a draft of his denied boarding compensation "on the day and place the denied boarding occurs". 14 C.F.R. § 250.8.

—Each carrier shall provide to passengers who are denied boarding a written explanation of their rights and how to exercise them. 14 C.F.R. § 250.9. The text of this statement is dictated by the CAB and is set forth in the footnote below.[4]

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[3] Nader concedes that the CAB would have primary jurisdiction to consider the legality of any practice for which the public has "constructive notice", such as by way of filed tariffs. Brief for Pet. at 42 n.26. Since the public filing with the CAB of airline rules directed to oversales is the functional equivalent of tariffs as far as notice is concerned, Nader appears to have conceded that the CAB has primary jurisdiction to hear his fraudulent misrepresentation claim.

[4] "Tariffs filed by this carrier with the Civil Aeronautics Board provide denied boarding compensation to a passenger holding confirmed reserved space where the flight for which the passenger holds such space is unable to accommodate him and departs without him.

"Passengers eligible for denied boarding compensation shall be

—Each carrier shall file monthly and quarterly reports with the CAB itemizing and describing the circumstances of the passengers who were

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compensated at the rate of 100 percent of the value of the first remaining flight coupon on their tickets with a $200 maximum and a $25 minimum. The carrier is required to tender to each such passenger, on the day and place the denied boarding occurs, a draft in the amount specified above which, if endorsed and paid within 30 days, shall relieve the carrier from liability for all claims for damages which might accrue to the passenger as a result of the carrier's failure to provide the passenger with space on the flight in question. Where, however, the carrier arranges, for the passenger's convenience, alternate means of transportation which departs before the draft can be prepared and tendered the passenger, tender will be made by mail or other means within 24 hours after the time the denied boarding occurs.

"In order to qualify for such compensation a passenger must have complied fully with the carrier's requirements as to ticketing, check-in and reconfirmation procedures and be acceptable for transportation under the carrier's tariff. However, a passenger is not eligible for compensation if (a) the flight for which the passenger holds confirmed reserved space is unable to accommodate him because of Government requisition of space or substitution of equipment of lesser capacity for operational and/or safety reasons; (b) the carrier arranges for comparable air transportation [6] or for other transportation accepted (i.e., used) by the passenger, which, at the time either such arrangement is made, is planned to arrive at the airport [7] of the passenger's next stopover or, if none, at the airport [8] of his destination earlier than, or not later than

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[6] 'Comparable air transportation' means transportation provided by air carriers or foreign air carriers holding certificates of public convenience and necessity or foreign permits issued by the Board.

[7] 'Airport' means the airport at which the direct or connecting flight, on which the passenger holds confirmed reserved space, is planned to arrive or some other airport serving the same metropolitan area that is served by the former: *Provided*, That transportation to the other airport is accepted (i.e., used) by the passenger.

[8] Ibid.

denied boarding for the reporting period. 14 C.F.R. § 250.10.

Thus, the CAB regulatory scheme clearly contemplates overbooking and the consequent rare oversale. In 1973, the CAB Office of Consumer Affairs published a booklet for air passengers, available upon request, confirming that oversales occurred in the regulated airline industry and that the remedy for the oversales was denied boarding compensation:

> The CAB's regulations require most certificated carriers to offer compensation to passengers holding confirmed reservations for a particular flight who have been denied boarding *because that flight has been oversold.* * * * [I]n short, if you get bumped, under certain conditions specified by CAB, you are entitled to a payment from the airline equal to the cost of your next flight coupon. This penalty payment is in addition to the transportation already purchased. [CAB, Air Travelers' Fly-Rights (unpaginated) (1973); emphasis added.]

The industry's overbooking and denied boarding practices were most recently scrutinized in the Emergency Reservations Practices Investigation described by the Court of Appeals. Pet. App. A33-A37. The Initial Decision of the administrative law judge noted

2 hours after, the time the direct or connecting flight, on which confirmed reserve space is held, is planned to arrive in the case of interstate and overseas air transportation, or 4 hours after such time in the case of foreign air transportation; or (c) the passenger is accommodated on the flight for which he holds confirmed reserved space, but is offered accommodations or is seated in a section of the aircraft other than that specified in his ticket at no extra charge: *Provided,* That a passenger seated in a section for which a lower fare is charged shall be entitled to an appropriate refund." [14 C.F.R. § 250.9.]

that oversales had actually decreased as a percentage of enplanements in recent years. Pet. App. A36. The judge found, despite arguments submitted to him by a consumer group that he should rule airline overbooking illegal, that "The present rules, regulations, and practices of domestic certificated scheduled air carriers pertaining to ticketing, reservations (including reconfirmation), and denied boarding compensation, in interstate transportation * * * are not unjust or unreasonable, unjustly discriminatory, unduly preferential, unduly prejudicial, or otherwise unlawful." Pet. App. A36, quoting Initial Decision, *supra*, at 29.[5]

The most significant aspect of the CAB's decisions in the overbooking-oversale area with respect to Nader's claim of fraudulent misrepresentation, how-

[5] The same judge noted in his opinion that "All carriers * * * engage in deliberate overbooking—or planned capacity management as it is referred to by some—to help offset the effects of the no-show, late cancellations, and the like." Initial Decision, *supra*, at 10. And he added in a footnote:

> Some parties contend that the airline practice of overbooking is somehow a justification for the tripling [of compensation for "bumped" passengers] proposal. However, it is clear from the record that, as the Board has previously recognized, deliberate overbooking is neither inherently evil nor necessarily adverse to the interests of the traveler. EDR-109, January 10, 1967. It does result in some oversales, the incidence of which has not been shown, and the carriers should continually seek to reduce the necessity for the practice. However, overbooking does produce positive benefits by expanding the passenger's opportunity to obtain the flight of his choice, adding flexibility to the reservations systems for securing, changing and canceling reservations, maximizing load factors and reducing the pressure for fare increases. Overbooking is likely to continue as a capacity management practice regardless of the level of denied boarding compensation and to be affected much more directly by other elements of the no-show control plan. [*Id.* at 52 n. 35.]

ever, was its ruling in 1967 that requiring airlines to give notice to passengers of the overbooked condition of flights was *not* in the public interest. In its *Notice of Proposed Rule Making,* EDR 95 at 4, 30 Fed. Reg. 13236 (1965), the Board proposed a rule requiring carriers to give notice 12 hours in advance of flight time to all passengers on an overbooked flight "to be helpful to passengers who may attempt to make alternative or contingent travel arrangements." In its next proposed rulemaking on overbooking, EDR 109, 32 Fed. Reg. 459 (1967), the Board reconsidered the proposed disclosure rule and decided that such a rule would not be in the public interest. Its decision was based in part on the credence that it gave to the airline industry's comments on the proposed notice rule that:

> [T]he proposed notification rule (1) would be largely unworkable; (2) would create anxiety and confusion on the part of the traveling public, severely weakening public confidence in air carrier reservations systems; (3) would increase unnecessarily, and at an undue cost to the industry, the already-heavy workload which must be handled within extremely narrow tolerances by airline reservations systems; (4) would cause the public to make a great number of duplicative and protective reservations; (5) would increase the already rapid turnover of reservations within the last 12-24 hours before departure; and (5) [sic] would increase the troublesome "no-show" and late cancellation problems. [JA 173-174.]

The Board further noted that disclosure of an overbooked condition, because of the response that it would likely induce in reservations-holding passengers, would be tantamount to banning overbooking, which the

Board did not wish to do. The Board found overbooking to be a benefit to the traveling public:

> It is also apparent that the notice requirement of EDR-95 would not only have the effect of controlling the practice of deliberate overbooking. The effect of the notice would be to seriously curtail the practice. Thus, carriers would not overbook if they were required to advise passengers of their overbooked status twelve hours prior to flight time in view of the resultant confusion, alarm, bitterness and cancellation of reservations. * * * Had the requirement proposed in EDR-95 been in effect, it is manifest that a very sizeable number of persons would have been needlessly alarmed by the notification of their overbooked status and that reservations would have been canceled on flights which actually could have accommodated these passengers. Further, were the carrier prevented from overbooking, large numbers of passengers would be denied reservations on flights which, because of reservations turnover and "no-shows," would depart with empty seats.
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> In our view, any realistic appraisal of the practice of overbooking leads to the conclusion that, while it results in oversales, it also contributes to flexibility and freedom in securing, changing and cancelling reservations. Thus, any rigid controls over overbooking, as now practiced, would inevitably lead to restrictions on privileges which contribute greatly to the convenience of air transportation, and have come to be relied upon by the traveling public. In addition such controls would reduce load factors, and the additional cost would ultimately have to be borne by the traveling public.
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> In light of the above, it can be seen that the present reservations systems of the carriers in general benefit the traveling public. [JA 176-177.]

Among the statutory authorities cited by the CAB for its actions in EDR-109—including its ruling that disclosure of overbooking was not in the public interest—was § 411 of the Act. JA 170. *See also* JA 197.

Accordingly, petitioner's statement that "* * * the CAB has never ruled that any airline's overbooking or related practices are not deceptive, or otherwise should be approved" (Brief for Pet. at 18) is true only to the limited extent that the CAB has never made airline-by-airline rulings. The Board's 1967 action, however, indisputably approves the airline industry's overbooking practies, including the industry's policy of nondisclosure.

II. THE DOCTRINE OF PRIMARY JURISDICTION COMPELS REFERENCE TO THE CAB OF THE DECEPTIVENESS VEL NON AND LEGITIMACY OF ALLEGHENY'S OVERBOOKING PRACTICES.

The Court of Appeals ruled that Nader's fraudulent misrepresentation claim should be deferred until the CAB had spoken on whether Allegheny's overbooking practices were deceptive or nevertheless legitimate within § 411 of the Act. If the CAB finds that those practices were not deceptive, then the practices cannot as a matter of law constitute common law misrepresentations. Pet. App. A30. This result was "but another application of the principles of primary jurisdiction, a doctrine whose purpose is the coordination of the workings of agency and court." Pet. App. A32.

The court's application of the doctrine of primary jurisdiction was proper. The doctrine has been fashioned so that those regulated by government agencies will not be subject to conflicting and contradictory directions from court and agency:

> Whether the agency happens to be expert or not, a court should not act upon subject matter that is peculiarly within the agency's specialized field without taking into account what the agency has to offer, for otherwise parties who are subject to the agency's continuous regulation may become the victims of uncoordinated and conflicting requirements. [3 K. Davis, *Administrative Law Treatise* § 19.01 at 5 (1958).]

Accord, Carnation Co. v. *Pacific Westbound Conference,* 383 U.S. 213, 221, *modified on other grounds,* 383 U.S. 932 (1966). This rationale was recognized by the Court of Appeals. Pet. App. A32.

A subsidiary rationale of the doctrine is that the expertise of regulatory agencies should be made available to each court, "thereby aid[ing] the court by laying a foundation for a more intelligent disposition of the question * * *." *Weidberg* v. *American Airlines, Inc.,* 336 F. Supp. 407, 409 (N.D. Ill. 1972). *Accord, Ricci* v. *Chicago Mercantile Exchange,* 409 U.S. 289, 305-306 (1973). This rationale was also recognized by the Court of Appeals. Pet. App. A32.

Thus, considering the rationale of the doctrine, it is not necessary that the regulatory agency have actually engaged in regulation of the practice or matter referred to it by the court, as long as the matter referred is within the agency's power to regulate—"within the sphere of regulation of the administrative agency" (*Adler* v. *Chicago & Southern Air Lines, Inc.,* 41 F. Supp. 366, 367 (E.D. Mo. 1941))—and involves the agency's specialized field. Here, as Part I of the Argument has shown, the CAB has been continually active in the area of overbooking and oversales, but such activity need not be a prerequisite to the invocation of primary jurisdiction.

Furthermore, the doctrine is particularly appropriate when the matter under consideration involves or has an effect on the rates of a regulated industry. Indeed, it was a common law challenge to a railroad rate that generated the seminal primary jurisdiction case, *Texas & Pacific Ry.* v. *Abilene Cotton Oil Co.*, 204 U.S. 426 (1907), in which this Court held that the reasonableness of regulated railroad rates must be decided by the Interstate Commerce Commission and not by the courts.

> For if, without previous action by the Commission, power might be exerted by courts and juries generally to determine the reasonableness of an established rate, it would follow that unless all courts reached an identical conclusion a uniform standard of rates in the future would be impossible, as the standard would fluctuate and vary, dependent upon the divergent conclusions reached as to reasonableness by the various courts called upon to consider the subject as an original question. Indeed the recognition of such a right is wholly inconsistent with the administrative power conferred upon the Commission and with the duty, which the statute casts upon that body, of seeing to it that the statutory requirement as to uniformity and equality of rates is observed. [*Id.* at 440-441.]

It is not only a direct challenge to a rate that invokes the primary jurisdiction doctrine; a challenge to any practice affecting rates must fall within the doctrine. The doctrine applies "to any practice of the carrier which gives rise to the application of rate." *Northern Pacific Ry.* v. *Solum*, 247 U.S. 477, 483 (1918) (Brandeis, J.). For example, in *Southwestern Sugar & Molasses Co.* v. *River Terminals Corp.*, 360

U.S. 411 (1959), the issue was whether a provision in a duly filed transportation tariff which purported to release the carrier from liability for its own negligence was a complete defense to a libel for negligence. Since the rate specified in the tariff was computed on the understanding that the exculpatory clause would relieve the carrier of the insurance expenses against liability for negligence, this Court held that the issue was sufficiently related to rates to fall within the primary jurisdiction of the ICC. *Id.* at 421.

Similarly, in *Vogelsang* v. *Delta Airlines, Inc.*, 302 F.2d 709 (2d Cir.), *cert. denied*, 371 U.S. 826 (1962), where the carrier cited a liability limiting provision filed with its tariff as a defense to a claim for conversion or misdelivery of baggage, the court construed the claim as an attack on the reasonableness of the liability limitation and affirmed the judgment for the defendant on this defense on the grounds that the CAB had approved the liability limitation, which was within its primary jurisdiction. *Id.* at 713.

With this understanding of the doctrine of primary jurisdiction, the correctness of the invocation of the doctrine by the Court of Appeals in the instant case cannot be questioned. Applying the uniformity rationale first, it is obvious that uniformity of the regulation of airlines' overbooking disclosure practices must obtain. The consequences to the airline industry would be disastrous if some airlines, through court rulings and punitive damages awards, were forced to disclose the overbooked conditions of flights and the resultant risk of oversales, while their competitors remained silent. As the CAB has noted, the disclosing airlines would suffer an immense competitive disadvantage. Passengers would seek transportation to their destina-

tions on the non-disclosing airlines rather than the disclosing airlines. Passengers would make multiple reservations, thus exacerbating the no-show problem. Or, passengers would simply seek non-air transportation, to their disadvantage as well as to the airlines'.

While the regulatory scheme permits some controlled experimentation in reservations procedures, as Nader points out (Brief for Pet. at 42-44), such deviations from a uniform scheme are carefully controlled by the Board through its administrative procedures. That the Board permits such experimentation does not alter the fact that court-imposed deviations from the regulatory scheme would be destructive of that scheme.

Petitioner's statement that airline overbooking practices are not "an area where uniformity is essential" (Brief for Pet. at 42) is absurd. The Court of Appeals found that the overbooking disclosure problem was "as wide as the industry itself [and] a single, industry-wide resolution is appropriate." Pet. App. A32. By adopting the regulatory scheme it has in this area, the CAB has implictly recognized that uniformity is essential. Moreover, it has specifically said so. "The no-show problem is essentially an industry problem, and it would be most desirable in our opinion that it be dealt with on a uniform basis." *Conditional Reservation Rule Proposed by Eastern Air Lines, Inc.*, Order No. 71-6-120 at 3 (1971). In a policy statement on whether the oral confirmation by carriers of reservations over the telephone was deceptive within § 411 of the Federal Aviation Act, the Board said, "Where substantial uniformity of practice is significant, as we deem it to be here, a statement of policy interpreting a general regulatory statute like section 411 is not only

justified but necessary." Regulation PS-58 at 4, 39 Fed. Reg. 38095 (1974).

In its amicus brief filed with the Court of Appeals the CAB urged the doctrine of primary jurisdiction because the practice challenged by petitioner's tort suit should be the subject of uniform regulation by the Board:

> [The District Court] departed from the salutary principle that carriers' practices should be regulated on a uniform basis and that the agency charged with their regulation should specify in the first instance what those practices should be. [Brief for Civil Aeronautics Board as Amicus Curiae at 15-16; footnote omitted.]

Similarly, the need for agency expertise in the area of airline overbooking and its disclosure is manifest. The CAB is charged by Congress with regulating the airline industry to serve, *inter alia*, "the public convenience and necessity", "the present and future needs of the foreign and domestic commerce of the United States", "the relations between * * * air carriers", "economical, and efficient service by air carriers at reasonable charges", "[c]ompetition to the extent necessary to assure the sound development of an air-transportation system", "safety" and "the need of each air carrier for revenue." 49 U.S.C. §§ 1302, 1482 (e). In carrying out its statutory responsibilities, the CAB has developed an expertise that enables it, far better than judges and juries, to pass on the merits of airline practices in the complicated area of reservations and overbooking.

The fact that this is a complicated area, requiring the most detailed knowledge and a balancing of inter-

ests, is reflected in the following statement by the CAB when it amended its oversales rules to make them applicable to foreign air carriers:

> These [oversales] rules, it must be remembered, stem from the Board's decision in its 1967 rule-making proceeding to refrain from banning outright the practice of intentional overbooking. Such a ban was and is well within the Board's authority in view of the undoubted harm which the practice does to those passengers who wind up being denied boarding despite their confirmed reservations, and the inherently deceptive and frequently discriminatory nature of the practice itself. The Board refrained from an outright ban only because of its concern for the adverse effect on carrier economics, and ultimately on passenger fares, of the seats left empty by cancellations and "no shows"—seats which the practice of intentional overbooking is designed to fill. But the Board considered that its abstention from an outright ban on the practice could only be justified if it prescribed an adequate, clearly defined, and readily available remedy to compensate those passengers who are harmed as a result of the practice, and only if it also required the carriers to adopt and abide by non-discriminatory boarding priority rules. If the Board lacks authority to prescribe these remedies, then the only alternative will be to outlaw intentional overbooking altogether.
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> [T]he Board's action * * * is a procedural device for reflecting the remedy which the Board has prescribed in its regulation of intentional overbooking practices, which would otherwise be subject to a complete ban, as unlawful, whether practiced by foreign or U.S. air carriers. [Reg. ER-880 at 8-9, 39 Fed. Reg. 38087, August 13, 1974.]

Turning to the effect on rates of Allegheny's overbooking practices, the Court of Appeals found that "the practices at issue have a significant rate making effect." Pet. App. A30. The court was not mistaken. The effect on rates of overbooking has been previously recognized in the courts. *Archibald* v. *Pan American World Airways, Inc.*, 460 F.2d 14, 16 (9th Cir. 1972). The CAB itself informed the Court of Appeals of the effects on airline revenues, and thus on rates, of overbooking:

> In order to balance multiple bookings, cancellations and no-shows with available seats, air lines must overbook their flights. Otherwise, planes will depart with many, many empty seats, costing the air lines precious revenues and requiring them to turn away in advance passengers who ultimately could have been accommodated. [Brief for the Civil Aeronautics Board as Amicus Curiae at 23.]

More particularly, the CAB has found that *disclosure* of overbooking would have an impact on airline revenues, and thus on rates, as already noted. Clearly, airlines' overbooking practices and their disclosure *vel non* bear as directly on rates, if not more so, than the exculpatory clauses held to have a rate-making effect in *Southewestern Sugar & Molasses Co.* v. *River Terminals Corp., supra,* and *Vogelsang* v. *Delta Airlines, Inc., supra.*

In addition to the need for uniformity of regulation, agency expertise, and the effect on rate-making, there is another factor, unique to this case, compelling reference to the CAB. The District Court apparently fashioned from Allegheny's status as a regulated common carrier a duty on its part to disclose its practice

of overbooking, the breach of which would constitute the tort of fraudulent misrepresentation.

> * * * The Defendant Allegheny Airlines is a common carrier which is licensed or authorized to do business by the Civil Aeronautics Board, as hereinbefore stated, and is the holder of a certificate of public convenience and necessity. As such it has a *public duty* and an especially large and high fiduciary obligation to make its policies known to all of its customers with regard to its intentional over-booking.
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> * * * CCAG is eligible and entitled to recover herein for damages it has incurred due to the Defendant's intentional misrepresentation even though they [sic] were not direct parties to the transaction in issue because: * * * CCAG was within the class of foreseeable plaintiffs (the class is determined by the Defendant's *legal duty to the public at large* both *under its license* and by its better position to prevent injury to the public by full disclosure of its practices affecting the public) * * *. [Pet. App. B6, B8; emphasis added.]

Clearly, the duties imposed by a certificate of public convenience and necessity from the CAB is for the CAB to determine, subject to judicial review, and not for the courts. The specter of judges and juries throughout the country imposing varying duties and obligations on certificated air carriers is frightening. Congress obviously sought to prevent such an outcome by its passage of the Federal Aviation Act, by which it determined that air carriers will be regulated by the CAB and not by the courts. This position was urged on the Court of Appeals by the CAB:

> This "public duty" found by the [district] court obviously derives not from the private obligations

> of the common law but from the public obligations imposed on air carriers by the Federal Aviation Act. *Cf. T.I.M.E. Inc.* v. *United States,* 359 U.S. 464 (1959). The regulatory pattern entrusts determinations of this nature to the Board alone for Congress intended that carriers' duties under the Act should be regulated by the Board on a uniform basis. *See Compania Nacional etc.,* 25 C.A.B. 141 (1957); *Viking Airliners, et al.,* 11 C.A.B. 401, 412 (1950); *Air America,* 18 C.A.B. 810, 814, 829-30 (1954); *cf. Ricci* v. *Chicago Mercantile Exchange,* 409 U.S. 289 (1973); *Danna* v. *Air France, supra,* 463 F.2d 407; *Hughes Tool Co.* v. *Trans World Airlines,* 409 U.S. 363 (1973); *Pan American World Airlines, Inc.* v. *United States,* 371 U.S. 296 (1963). [Brief of the Civil Aeronautics Board as Amicus Curiae at 34.]

As we have noted, the imposition of substantial punitive damages for the breaching of the "public duty" found by the District Court is tantamount to an injunction against overbooking. It has always been the law that courts lack the power in the first instance to enjoin as unreasonable those practices in a regulated industry which are subject to the cease and desist power of the appropriate agency. This rule has been specifically applied to injunctions and punitive damages awards in the area of airline overbooking. *Mortimer* v. *Delta Air Lines,* 302 F. Supp. 276 (N.D.Ill. 1969); *Wills* v. *Trans World Airlines, Inc.,* 200 F. Supp. 360 (S.D. Cal. 1961). Pet. App. A46-A47.

In addition to the general, and unpersuasive, argument that this is not a case for the application of the primary jurisdiction doctrine, petitioner makes various more specific arguments against primary jurisdiction, which are equally without merit. He argues that

reference of the question of the deceptiveness *vel non* of Allegheny's overbooking practices pursuant to § 411 of the Act would open the floodgates and force the CAB "to concern itself with all manner of trivial issues." Brief for Pet. at 38. If this is indeed the result of the Court of Appeals' decision, it does not appear to concern the CAB, which should be the most vigorous guardian of its jurisdiction and workload. The CAB argued to the Court of Appeals that the question of overbooking disclosure belonged before it pursuant to § 411:

> While we view the issue of culpability for overbooking and the non-disclosure thereof as properly falling within the ambit of Section 411, the point is academic in relation to the issue of whether the court erred in this case in independently evaluating Allegheny's practices. Plainly, Allegheny's practices are subject to Board regulation, and either the primary or exclusive jurisdiction principle is applicable to them irrespective of the statutory provision under which they may be catalogued. [Brief for the Civil Aeronautics Board as Amicus Curiae at 20; footnote omitted.]

Flooding the CAB with trivial issues, however, will not be the consequence of affirming the Court of Appeals' decision. Only lawsuits meeting the traditional tests of primary jurisdiction, as described above, would be referred to the CAB. Certainly, this test would bar "trivial" references. Moreover, the CAB will be its own judge of whether, and how extensively, it need consider the referenced matters. *See Ricci* v. *Chicago Mercantile Exchange, supra,* 409 U.S. at 304 n.14; *S.S.W., Inc.* v. *Air Transport Ass'n of America,* 191 F.2d 658, 663 (D.C. Cir. 1951), *cert. denied,* 343 U.S. 955 (1952).

Finally, petitioner suggests that the adjudication of private disputes under state law is not a matter within the primary jurisdiction of the CAB, and that the statutory powers of the agency "are to be exercised only as a means of vindicating the public interest * * *." Brief for Pet. at 49. He concludes:

> The courts of law, rather than the regulatory agencies charged with the protection of the overall public interest, are available for the resolution of private controversies involving air carriers. [*Id.* at 49-50; footnote omitted.]

The considerations of uniformity and consistency in the regulatory scheme, and of agency expertise, underlying the doctrine of primary jurisdiction point clearly to the non-existence of any asserted "private grievance" exception to the doctrine. It matters not that the courts are equipped by experience and tradition to adjudicate private common law claims if those claims raise issues whose resolution may affect the uniformity of regulation or may be aided by an agency determination.[6] For example, in *Southwestern Sugar & Molasses Co.* v. *River Terminals Corp., supra,* 360 U.S. 411, the issue was the effect to be given an exculpatory clause in a negligence case. Although the courts traditionally resolved such issues, this Court held that the issue was within the primary jurisdiction of the ICC.

> We may assume that the question whether a clause of this kind offends against public policies is one

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[6] Nor, for the same reason, does the propriety of invoking primary jurisdiction turn upon the particular nature of the relief plaintiff seeks. *Laveson* v. *Trans World Airlines,* 471 F.2d 76, 83 (3rd Cir. 1972). "Rather, it rests upon a judicial reluctance to hold practices within the scope of an agency's jurisdiction to be [unlawful] • • • before prior resort to the agency." *Id.* at 83-84.

> appropriate ultimately for judicial rather than administrative resolution. But that does not mean that the courts must therefore deny themselves the enlightenment which may be had from a consideration of the relevant economic and other facts which the administrative agency charged with regulation of the transaction here involved is peculiarly well equipped to marshal and initially to evaluate. [*Id.* at 420.]

Thus, petitioner's purported public/private grievance distinction is untenable, and has been consistently rejected by the courts. In *General American Tank Car Corp.* v. *El Dorado Terminal Co.*, 308 U.S. 422, 432 (1940), "[t]he action was an ordinary one in assumpsit on a written contract" between private parties. Nevertheless, since it raised a question of the legality of the practices of one of the parties, which was subjected by the regulatory statute to the administrative authority of an agency, this Court invoked the doctrine of primary jurisdiction. *Thompson* v. *Texas Mexican Ry.*, 328 U.S. 134 (1946), was a state court action between private parties for breach of contract, in which the trial court awarded damages and was upheld on appeal in the state courts. This Court reversed, invoking the ICC's primary jurisdiction.

> These matters involve not only the interests of the two parties to the trackage agreement but phases of the public interest as well. A court which enforced the termination clause of the agreement pursuant to its terms would be narrowing the choice of the Commission and perhaps embarrassing it in the performance of the functions with which it has been entrusted. [*Id.* at 143-144.]

And in *American Airlines, Inc.* v. *North American Airlines, Inc.*, 351 U.S. 79, 83 (1956), this Court suggested

that the CAB's primary jurisdiction could be exercised in a "proceeding which may be generated from facts also giving rise to a private dispute * * *," evidently perceiving no mutual exclusivity between public and private disputes. Moreover, here Nader's purported distinction seems substantially undermined by the trial court's predication of the carrier's liability upon breach of an alleged "public duty."

III. IF THE CAB SANCTIONS ALLEGHENY'S OVERBOOKING PRACTICES, SUCH PRACTICES CANNOT CONSTITUTE A COMMON LAW TORT.

Petitioner argues that the facts of this case do not warrant the extinguishing of his common law tort claim, although he concedes that the law permits such an extinguishing in certain circumstances. Brief for Pet. at 40. He argues further that even assuming his common law tort could be taken away by the action of an agency, "the concept that it could do so *retroactively* * * * cannot be supported." *Id.* at 48. His contention rests primarily on the common law rights savings clause of the Act, 49 U.S.C. § 1506.

The doctrine of primary jurisdiction, which has been properly applied in this case, contemplates the subordination of common law claims when those claims are repugnant to the regulatory scheme. This is what Nader concedes. Professor Jaffe has explained that a court will not lose its jurisdiction over the common law cause of action, but must defer to the finding of the agency on the element, or issue, of the common law cause of action referred to the agency. In this case it is the deceptiveness *vel non* of Allegheny's actions—one element of the common law tort of fraudulent misrepresentation—that has been assigned to the agency, as well as the legitimacy of those actions if deceptiveness is somehow involved.

> Primary jurisdiction is *pro tanto* exclusive jurisdiction; insofar as the agency has jurisdiction it excludes the courts. But the court, though not competent to decide one of the issues, may still have jurisdiction over the cause of action to which decision of the issue is relevant, as in the case, for example, where the doctrine of collateral estoppel operates. The jurisdiction of the court will extend to the remaining issues and the relief to be granted.
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> * * * The primary jurisdiction of an agency may extend so far that it involves virtual judicial withdrawal. [Jaffe, "Primary Jurisdiction," 77 Harv. L. Rev. 1037, 1038-39 (1964).]

This view of exclusive primary jurisdiction was ratified by this Court in *United States* v. *Western Pacific Ry. Co.*, 352 U.S. 59 (1956), in which Mr. Justice Harlan described for the Court the doctrine of primary jurisdiction as follows:

> The doctrine of primary jurisdiction thus does "more than prescribe the mere procedural time table of the lawsuit. It is a doctrine allocating the law-making power over certain aspects" of commercial relations. "It transfers from court to agency the power to determine" some of the incidents of such relations. [*Id.* at 65, quoting Jaffe, "Primary Jurisdiction Reconsidered," 102 Univ. Pa.L.Rev. 577, 583-584 (1954); footnote omitted.]

Such a "transfer" contemplates a removal of the power over certain "commercial relations" from the courts, although courts still retain jurisdiction over the remaining elements of the cause of action. This view was first suggested in *Texas & Pacific Ry. Co.* v. *Abilene Cotton Oil Co., supra,* and has been followed in subsequent cases. Thus, *United States Nav. Co.* v. *Cunard S.S. Co.*, 284 U.S. 474 (1931), and *Far East Conf.* v. *United States,* 342 U.S. 570 (1952), have been construed by this Court as finding exclusive primary jurisdiction in an agency to make certain initial determinations. *Carnation Co.* v. *Pacific Westbound Conf., supra.*, 383 U.S. at 220. Nader has himself characterized *Texas & Pacific Ry.* v. *Abilene Cotton Oil Co., supra*, and *Danna* v. *Air France*, 463 F.2d 407 (2d Cir. 1972), as cases "where an essential issue in the case (*e.g.*, the reasonableness of tariff rates) can *only* be decided by the agency." Pet. for Cert. at 19 n.22; emphasis added.

The operation of exclusive primary jurisdiction can also be seen in this Court's decision in *Port of Boston Marine Terminal Ass'n* v. *Rederiaktiebolaget Transatlantic,* 400 U.S. 62 (1970). Plaintiff sued defendant in state court for payment of certain wharf demurrage charges, and the action was transferred to District Court. Since the demurrage charges had not been filed with the Federal Maritime Commission ("FMC"), the District Court invoked the doctrine of primary jurisdiction and stayed the proceedings to allow the defendant to obtain a ruling from the FMC on the validity of the charges. The FMC generally held the charges to be valid. Assuming the FMC's primary jurisdiction to have been exclusive, the District Court concluded that it had no jurisdiction to review the FMC decision and entered a judgment against the defendant. The Court of Appeals reversed on the merits. This Court approved the District Court's invocation of the doctrine of primary jurisdiction.

> This is an almost classic case for engaging the doctrine * * *. The Commission was uniquely qualified to consider the dispute in light of the overall

> policies concerning terminal conferences and the conferences' relationship with both carrier-vessels and consignees. The District Court did not err in determining, for purposes of this litigation, that an Article III court, acting on a single, isolated case-and-controversy record in a private suit in which neither the Commission nor the Government was a party, would lack the requisite capacity. [*Id.* at 68-69.]

This Court then held that "the District Court also concluded correctly that it was without authority to review the merits of the Commission's decision." *Id.* at 69. The Court noted that the Administrative Orders Review Act, 28 U.S.C. § 2342 (1964 ed., Supp. V), provided the exclusive method for reviewing final orders of the Maritime Commission. Here, § 1006 of the Federal Aviation Act lodges all appeals from CAB orders in the courts of appeal, which have exclusive jurisdiction to affirm, modify, or set aside the orders.

In light of the cases on exclusive primary jurisdiction, we respectfully submit that the task of this Court is to determine merely whether the Court of Appeals erred in its finding that a continued tort of fraudulent misrepresentation in this case would be inconsistent with the regulatory scheme which treats nondisclosure of overbooking not to be deceptive. The Court of Appeals' decision in this regard was manifestly correct. It has already been shown that to permit oversold passengers, at their whim, to sue and collect punitive damage awards from overbooking airlines would be completely disruptive of the regulatory scheme that contemplates overbooking as an economic necessity and that has found nondisclosure of overbooking to be in the public interest. There is

no practical distinction between the fluctuating standard of duty with respect to overbooking disclosure that would be placed on airlines by the varying judgments of judges and juries throughout the country and the varying standards of court-determined reasonableness of rates found to be impermissible by this Court in the *Abilene Cotton Oil Co.* case.

Petitioner's contention that an airline's "deliberate concealment of * * * [a] material fact * * * is simply beyond the CAB's power to approve" (Brief for Pet. at 47-48) is wrong. It is wrong, first, as conflicting with petitioner's own concession that certain common law remedies must give way to regulatory schemes. It is also wrong in light of the operation of the doctrine of primary jurisdiction as hereinabove described. The courts have frequently held that a regulatory statute may contemplate conduct which would be unlawful but for the regulatory legislation. Thus, in *Silver* v. *New York Stock Exchange*, 373 U.S. 341, 360 (1963), the Court held that the Securities Exchange Act contemplates that the Exchange will "engage in restraints of trade which might be unreasonable absent sanction" by the Act. *Accord, Ricci* v. *Chicago Mercantile Exchange, supra*, 409 U.S. at 303-304 (Commodity Exchange Act). *See also United States Nav. Co.* v. *Cunard S.S. Co., supra*, 284 U.S. at 487 (apparently unlawful shipping agreement "might, upon a full consideration of all the attending circumstances, be approved or allowed to stand with modifications [by the agency]"). The courts have also sanctioned the power of the CAB in exercise of its primary jurisdiction to approve liability disclaimer and exculpatory provisions which would be unlawful or invalid under the common law.

See, e.g., Southwestern Sugar & Molasses Co. v. *River Terminals Corp., supra* (exculpatory provision); *Lichten* v. *Eastern Airlines, Inc.,* 189 F.2d 939 (2d Cir. 1951) (liability disclaimer).

Nader's argument throughout his Brief that the common law savings clause of the Act somehow operates to alter the doctrine of primary jurisdiction is in error. The common law savings clause, which is often found in regulatory schemes, is not an exception to the doctrine of primary jurisdiction. This has been clear since *Texas & Pacific Ry.* v. *Abilene Cotton Oil Co., supra,* which held that a common law savings clause virtually identical to the one invoked by Nader was no bar to the exercise of the doctrine of primary jurisdiction. This Court held that the clause could not preserve a common law right "the continued exercise of which would be absolutely inconsistent with the provisions of the act. In other words, the act cannot be held to destroy itself." 204 U.S. at 446. *Accord, Pennsylvania R.R.* v. *Puritan Coal Co.,* 237 U.S. 121, 129-130 (1915); *Danna* v. *Air France,* 334 F. Supp. 52, 57 (S.D.N.Y. 1971), *aff'd, supra,* 463 F.2d 407 (construing § 1106 of the Federal Aviation Act). Congress, by including the common law savings clause in the Federal Aviation Act that authorized the entire regulatory scheme, clearly did not intend it to operate to permit private plaintiffs to recover damage awards for activities by air carriers—here, the nondisclosure of overbooking—that were found to be necessary and in the public interest by the regulatory agency.

Furthermore, it should be remembered that the Court of Appeals' decision does not leave oversold passengers without a common law remedy against the airlines. The Court of Appeals reinvigorated the traditional common law claim of an oversold passenger, which is a court-made cause of action founded on the antidiscrimination provision of the Act. Pet. App. A16-18. After applying the elements of the "bumping" cause of action to Nader, the Court of Appeals found that Nader had not fully proved the elements of that claim in the trial court, and that portion of the case was remanded. The traditional "bumping" cause of action, pursuant to § 404(b) of the Act that has been characterized as "more generous" than the common law (*Mason* v. *Pan American World Airways, Inc.,* 13 Av. L. Rep. 17,114, 17,117 (D.D.C. 1974) (Gesell, J.)), is not inconsistent with the regulatory scheme because it allows recovery only against airlines that deviate from their own boarding priority rules (which are required to be filed with the Board by 14 C.F.R. § 250.3) in determining which passengers are oversold. In other words, a passenger has no cause of action under § 404(b) if he becomes an oversale as a result of properly applied boarding priority rules on file with the CAB. But if airlines deviate from CAB-filed practices and an oversale results, the airlines may be liable for compensatory and punitive damages. Nothing in the Court of Appeals' decision changes this law.

Lastly, Nader contends that even though the doctrine of primary jurisdiction might extinguish some common law claims that are inconsistent with regulatory schemes, the doctrine cannot operate retroactively. Nader cites no authority for his anti-retroactivity argument other than instances in which the doctrine has operated prospectively rather than retroactively. Brief for Pet. at 48. The two-fold answer to Nader's argument on retroactivity is that a CAB

ruling that Allegheny's overbooking practices are not deceptive will not be a retroactive ruling and that, even if the ruling could be construed to be retroactive, the doctrine of primary jurisdiction permits such retroactive rulings.

The CAB has been wrestling with the overbooking problem for years, as we have shown. We think it is clear that it has both approved overbooking and determined that passenger-by-passenger disclosure would be highly prejudicial to the public. If the CAB agrees in its forthcoming proceedings, it will not be declaring these policies for the first time—and thus validating *future* overbooking and nondisclosure—but rather it will be reasserting that which it has said for many years. It will, in effect, be making clear that Allegheny's practices have been valid in the past and that the common law remedy has to that extent been displaced.

Even if, however, an eventual Board ruling could be construed as retroactive, there is nothing in the doctrine of primary jurisdiction that prohibits such retroactive rulings, and they have occurred frequently. Considering the rationale of the doctrine of primary jurisdiction, this must be so. The factors of uniformity of regulation and agency expertise come as much into play when the agency has not yet ruled as when it has already ruled. In looking at the question in the manner posed by Nader, what difference is there between a person prevented from recovering on a claim because, as Nader argues here, the reference to the agency will result in a ruling sanctioning the allegedly tortious practices, and a person prevented from recovering on a claim because the agency has already made such a ruling? In both cases a common

law claim has given way to a regulatory scheme, as Nader concedes can occur. Why the operation of the doctrine of primary jurisdiction can operate "prospectively" but not "retroactively" Nader has not even attempted to explain or find authority to support.

The courts have made no distinction between retroactivity and prospectivity in their application of the doctrine of primary jurisdiction. A complicated question of whether car-mileage allowances from railroads should be paid over to the lessor of the cars or to the lessee, when the filed tariff contained no provisions answering the question, was held to lie within the primary jurisdiction of the ICC in *General American Tank Car Corp.* v. *El Dorado Terminal Co., supra.* Any doubt that the Court there recognized the agency's primary jurisdiction to determine the reasonableness of a past practice was effectively removed by this Court's subsequent decision upon appeal of the ICC's determination in the same matter. In *El Dorado Oil Works* v. *United States,* 328 U.S. 12, 17 (1946), this Court noted that by its previous decision it had "accepted [the] contention that determination of the validity of the challenged past practices was for the Commission."

> The question before us when this case was first here did not relate to future but to past allowances. Relying on past decisions, we held that the "reasonableness and legality" of the past dealings here involved were matters which Congress had entrusted to the Commission. [*Id.* at 19.]

Similarly, in *Far East Conf.* v. *United States, supra,* 342 U.S. 570, the question was the lawfulness under the antitrust laws of a system of dual freight rates

which had not themselves been filed with the Federal Maritime Commission ("FMC"). This Court showed no hesitation in holding that resort must first be made to the FMC which had primary jurisdiction of the issue of the rates' lawfulness under the Shipping Act, although its determination could effectively be retroactive. *See also United States Nav. Co.* v. *Cunard S.S. Co., supra*, 284 U.S. at 486-487. Mr. Justice Brennan later interpreted these two cases as invoking the doctrine "when 'there is a possibility that a *subsequent* administrative decision would approve the questioned activities * * *.' " *Pan American World Airways, Inc.* v. *United States*, 371 U.S. 296, 332 (1963) (Brennan, J., dissenting) (emphasis added), quoting Schwartz, "Legal Restriction of Competition in the Regulated Industries: An Abdication of Judicial Responsibility," 67 Harv. L. Rev. 436, 464 (1954). The primary jurisdiction doctrine was also applied by this Court retroactively in *Port of Boston Marine Terminal Ass'n* v. *Rederiaktiebolaget Transatlantic,* discussed *supra. Accord, S.S.W., Inc.* v. *Air Transport Ass'n of America, supra.*

CONCLUSION

For each of these reasons, we respectfully submit that the judgment of the Court of Appeals should be affirmed.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-455

RALPH NADER,

Petitioner,

v.

ALLEGHENY AIRLINES, INC.,

Respondent.

ON A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

I. THE CIVIL AERONAUTICS BOARD IS NOT EMPOWERED TO SANCTION TORTIOUS MISREPRESENTATIONS BY ITS REGULATEES.

A fundamental weakness in the decision below is its assumption that Congress has granted the Civil Aeronautics Board authority to approve fraudulent transactions on the part of its regulatees. As pointed out in Petitioner's opening brief (pp. 45-46), the statute under which the CAB operates contemplates the *elimination* of unfair and deceptive practices from the airline industry, not

their immunization from common law liability. Like the court below, Respondent is unable to point to any language in the Federal Aviation Act or its legislative history even remotely suggesting CAB authority to affirmatively sanction deliberate misrepresentations or omissions of material facts by an air carrier in its dealings with the public. It has merely argued that "a regulatory statute may contemplate conduct which would be unlawful but for the regulatory legislation." (Resp. Br. p. 43). The issue here, however, is not whether Congress *could* pass a law empowering the Board to approve deceptive practices, but whether Congress in fact did so.

Section 411 of the Aviation Act sets forth the duty of the Board to investigate and eliminate unfair or deceptive practices in air transportation, but nowhere does it or any other provision suggest that the Board may approve or foster practices that are unfair or deceptive.[1] The general public interest in seeing that the airline industry is reasonably profitable and on a sound financial footing certainly cannot be translated into a roving power for the CAB to license deceit or fraud, particularly in light of the strong policy against unfair and deceptive practices in the Federal Aviation Act and its legislative history. (See Pet. Br. at 38-39, 46.)

Nor is it proper to imply authority to sanction common law fraud from the Aviation Act since, where Congress has intended to permit the CAB to immunize otherwise illegal activities, it has expressly conferred such

[1] Under 411 the Board has broad discretion not to exercise jurisdiction over practices that may be deceptive in fact, but its inaction in such cases in no way precludes private parties from seeking relief through civil litigation, based on theories other than section 411. See *REA Express, Inc. v. CAB*, 507 F.2d 42 (2d Cir. 1974).

power in the statute. Thus, section 408 empowers the Board to approve certain consolidations, mergers, and other transactions, section 409 permits the agency to approve certain interlocking relationships, and section 412 contemplates that it may approve pooling, price fixing, market division, and other agreements, but in each instance the immunity flowing from approval by the Board is expressly provided for by section 414.[2] There is, of course, no comparable section in the Aviation Act that would permit the agency to approve fraudulent misrepresentations, or to protect air carriers from common law liability. Significantly, the Board itself has never asserted, or even suggested, that it might have such a power, and nothing suggested by Respondent or the court below can be read as granting that power to the Board.[3]

[2] As noted in *Carnation Co. v. Pacific Westbound Conference*, 383 U.S. 213, 222 (1966), an agency's powers under such provisions are prospective only, and could not be exercised retroactively to immunize past conduct from civil liability for treble damages. Moreover, this Court has repeatedly emphasized that a statute conferring such approval and immunizing powers upon an agency, in derogation of other aspects of public policy, must be read narrowly, not broadly. *Federal Maritime Commission v. Seatrain Lines*, 411 U.S. 726 (1973). And as the Court made clear in *Seatrain*, the fact that there might be areas over which no power of approval was granted by Congress does not justify the courts in rewriting the statute to supply the missing powers. The reasons for judicial restraint in expanding agency powers are, we suggest, at least as compelling in the context of sanctioning fraudulent or deceptive practices as in an antitrust context.

[3] The CAB's express statutory powers to pass upon duly filed airline tariffs – including those limiting a carrier's liability or otherwise altering its common law duties – are not involved here, because nothing in Allegheny's tariffs provides for concealed overbooking or exclusion of liability for its deliberate misrepresentations. If such a tariff existed, and had not been summarily

(continued)

II. THE CAB HAS NEVER APPROVED CONCEALMENT OR MISREPRESENTATION OF MATERIAL FACTS REGARDING OVERBOOKING .

In Part I of its Argument, Respondent asserts that the CAB's 1967 rulemaking action "indisputably approves the airline industry's overbooking practices, including the industry's policy of nondisclosure." (Resp. Br. at 26). This, of course goes far beyond the holding of the court of appeals, which concluded that the CAB had never resolved whether deliberate overbooking, or its deliberate concealment from the public, are deceptive practices. (Pet. App. A 32.) Under the theory now urged by Respondent, the purpose of a referral to the CAB would simply be to determine whether that carrier's deceptive reservations practices fall within the ambit of the Board's purported industry-wide sanction of concealed overbooking.

If, indeed, the CAB had taken the action ascribed to it – assuming that it had the power to do so – and if Allegheny's conduct was within the scope of the CAB's approval, the continuing validity of a common law right of action arising out of that conduct would be drawn into serious question. The issue here, then, is whether

[3] (continued) rejected by the CAB, a different case would be presented. *Cf. Southwestern Sugar & Molasses Co. v. River Terminals Corp.*, 360 U.S. 411 (1959). Certainly the submission to an official in the CAB's Bureau of Economics of portions of a manual provided only to Allegheny's employees, which in fact *conceals* the practice of overbooking (see Pl. Exh. 6, JA 145, 148), cannot be considered the "functional equivalent" of a tariff providing for overbooking, despite Respondent's suggestion to the contrary. (Resp. Br. p. 20, n. 3.) Tariffs, unlike a company manual, are required to be available for public inspection and copying at each office of the airline, and its employees must assist interested persons in securing information from them. See 14 CFR § 221.170, *et seq.*

the CAB has ever sanctioned misrepresentations or the concealment of material facts regarding reservations by the industry at large or by any particular carrier such as Allegheny. We think it plainly has not.

First, the Board's 1967 decision not to impose a proposed affirmative passenger notification rule (EDR-95, 30 F.R. 13236 (1965)) cannot be regarded as an approval of deceptive practices. That proposal would have required each airline to identify each flight which became overbooked either inadvertently or intentionally, to determine which particular passengers would be denied boarding if everyone showed up for the flight and, no less than 12 hours before scheduled departure, to contact each of them with a warning about the possibility of their being bumped. In response to the proposal, the airlines argued that compliance would have been beyond the capabilities of their reservations systems as then operated. They pointed out, for example, that it would have been virtually impossible to figure out which passengers would have to be notified pursuant to the denied boarding priority rules. The cost of processing the information, and of personally contacting what the carriers estimated would be millions of individual passengers annually by telephone, some by long distance, would have been enormous. Moreover, the carriers demonstrated that the result of this warning in the great majority of cases would have been to unduly alarm and enrage passengers who would in all likelihood be accommodated on their proper flights. The carriers saw the proposal as excessively rigid and unworkable, and one that would do far more harm than good. This was particularly so, they said, in light of evidence that the vast majority of oversales at that time were caused by factors other than overbooking, such

as human error, communications breakdowns, and substitution of smaller aircraft for maintenance or operational reasons.[4] (JA 172-177.)

After considering the industry's objections, the Board agreed that the notification rule as proposed would in fact be too burdensome and inflexible, without corresponding benefits. EDR-109 (Jan. 10, 1967) (JA 170-194). For that reason it decided to drop its earlier proposal and approach the problem from an entirely different angle – seeking, in effect, to develop incentives for carrier innovation and improvement in their reservations systems. While the Board was obviously aware in 1967 that some airlines did use overbooking as a reservations strategy – although it is equally true that other airlines did not[5] – there was nothing in the record to suggest that the problem was the massive one it has since become, with over

[4] In 1967 it could legitimately be argued that overbooking was responsible for few if any actual oversales. Since then, however, computers and communications technology have literally revolutionized airline reservations systems. Practices such as "free sale" and "block ticketing," which the CAB criticized in 1967, have been virtually eliminated. Overbooking as practiced today by Allegheny is a systemwide statistical program applicable to all flights by means of sophisticated computer methodology, quite a different process than the occasional practice used primarily at the discretion of local station managers 10 years ago.

[5] "The *only* reasons for overbookings and for oversales on Ozark are personnel errors by employees of Ozark, other air lines or travel agencies, and breakdowns or defects in communications resulting in delayed delivery or non-delivery of status information." Comments of Ozark Air Lines, Inc. on Proposed Rules (EDR-95), Docket 16563 (Feb. 2, 1966), at p. 3. See also Pet. Br. at 27-28, n. 19.

100,000 passengers being denied boarding annually. (See Pet. Br. p. 9, n. 6.) No one suggested in 1967 that all overbooking should be prohibited, and what the Board did was merely decline to approve a program that would have required, among other things, millions of calls to be made to prospective passengers and substantial changes in carrier practices and facilities. That is hardly the same as "approving" overbooking in any affirmative sense, and it certainly is not tantamount to authorizing the airlines to engage in deliberate concealment or misrepresentation of their practices. The fact is that the CAB in 1967 and subsequently has made clear that the right of any bumped passenger to sue the airline is preserved, a fact that simply cannot be reconciled with Respondent's version of what was done. If the agency was affirmatively sanctioning overbooking or its concealment in 1967, as Respondent claims, it would have been utterly meaningless to give passengers who are denied boarding the option "to pursue their remedy under the common law."[6] EDR-248, 38 F.R. 15083 (1973).

It is simply not a fair characterization of the Board's 1967 rulemaking action to say that candid public disclosure by an airline of its reservations practices was found to be not in the public interest, nor is it correct

[6] The implied federal cause of action arising under section 404(b) of the Aviation Act, which Respondent advances as the "common law remedy" contemplated by the Board (Resp. Br. pp. 44-45), is available only in unusual circumstances where the carrier not only oversells a flight, but then compounds the problem by accommodating individuals on a discriminatory basis and in violation of its own established priority rules. The CAB's rules have never suggested that this type of action is the sole civil remedy available to bumped passengers, or that it would preclude other, more traditional common law actions under state law.

to conclude that the CAB's regulatory scheme "treats nondisclosure of overbooking not to be deceptive," as Respondent asserts. (Resp. Br. pp. 16, 20, 42.) Indeed, there was nothing in the Board's 1967 rulemaking record to suggest that any carriers were misrepresenting or concealing material facts. What the Board has said is that it will impose the minimum possible regulation on the carriers' reservations systems to assure fair and nondiscriminatory treatment of passengers who are denied boarding. Whether or not an airline chooses to overbook its flights, and how it manages its reservations system, are matters that have been left entirely up to management discretion; and if overbooking leads to oversales, the carrier is on notice that it is subject to normal rules of liability under the common law, unless the passenger voluntarily accepts the tender of liquidated damages.

The fact of the matter is that Respondent has willingly embarked on a major effort to increase its share of the market, by overbooking its flights on a regular basis and concealing this fact from the traveling public. The resulting oversales, which Allegheny's own president testified are "statistically certain" to result from its overbooking practice (JA 129), cannot be fairly described as either "rare" or "statistical aberrations" as Respondent contends. (Resp. Br. pp. 4, 5, 17, 19.) The Allegheny reservation system, quite simply, is programmed to allow a level of oversales that the company deems "acceptable" and not out of line with the rest of the industry. (JA 121-123). That program has resulted in hundreds of persons every month – year in, year out – having Allegheny flight reservations dishonored without warning. In April, 1972, when it happened to Mr. Nader, an average of 30 people a day were bumped by this one airline alone

as a result of its practice – hardly "rare" by any meaning of the word. Petitioner seeks to hold Respondent accountable for its decision to employ a system that has deceived and seriously inconvenienced thousands of passengers every year in order to enhance Allegheny's profits. Certainly nothing the CAB said or did in 1967 supports the claim that concealment or nondisclosure of material facts relating to Respondent's present reservations practices has been approved and thus immunized by the Board.

III. THIS CASE DOES NOT INVOLVE THE PRIMARY JURISDICTION DOCTRINE

Respondent also argues that the circuit court properly required referral to the CAB under the doctrine of primary jurisdiction. We disagree. All of the cases cited by respondent involved very different questions from those presented here, such as the accommodation of antitrust laws to a conflicting regulatory regime,[7] or the reasonableness of duly filed tariffs or agreements.[8] Respondent's suggestion that its concealment of overbooking has a direct relationship to passenger rates is seriously undercut by the fact that this practice is nowhere set forth or

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[7] *E.g., United States Navigation Co. v. Cunard Steamship Co.*, 284 U.S. 474 (1932) (injunction against anticompetitive practices possibly lawful under Shipping Act); *Far East Conference v. United States*, 342 U.S. 570 (1952) (validity of conference rate agreement); *Carnation Co. v. Pacific Westbound Conference, supra* (anticompetitive conduct arguably lawful under agency approval); *Ricci v. Chicago Mercantile Exchange*, 409 U.S. 289 (1973) (propriety of actions under Commodity Exchange Act).

[8] *E.g., Texas & Pacific Ry. Co. v. Abilene Cotton Oil Co.*, 204 U.S. 426 (1907) (reasonableness of rates); *Northern Pacific Ry. v. Solum*, 247 U.S. 477 (1918) (routing practices affecting tariff

(continued)

referred to in Respondent's tariffs, and concealed overbooking has never been involved in any ratemaking or similar proceeding before the CAB. The argument that federally-imposed uniformity is necessary here cannot be squared with the CAB's determination that reservations matters, including overbooking, should be left free from its direct regulation and subject to free market forces and the rules on common law liability. (See Pet. Br. pp. 34-36.)

Finally, contrary to Respondent's theory (Resp. Br. at 35), an award of punitive or treble damages on account of past conduct is not the equivalent of a judicial injunction prohibiting that conduct in the future. *Carnation Co. v. Pacific Westbound Conference,* 383 U.S. 213, 222 (1966). An injunction has continuing mandatory effect upon the parties, and it may not be lifted by an agency such as the CAB. By contrast, if the carriers believe that a damage award against Allegheny on account of its past conduct would interfere with their ability to provide the public with air transportation, they are free to go back to

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[8] (continued) charges); *General American Tank Car Corp. v. El Dorado Terminal Co.,* 308 U.S. 422 (1940) (reasonableness of private car rates); *Thompson v. Texas Mexican R. Co.,* 328 U.S. 135 (1946) (reasonableness of rates for trackage rights); *United States v. Western Pacific R.R. Co.,* 352 U.S. 59 (1956) (construction and reasonableness of tariff classification); *Southwestern Sugar & Molasses Co. v. River Terminals Corp., supra* (reasonableness of exculpatory tariff rule); *Port of Boston Marine Terminal Assn. v. Rederiaktiebolaget Transatlantic,* 400 U.S. 72 (1970) (validity of demurrage charges under approved conference agreement); *Vogelsang v. Delta Airlines, Inc.,* 302 F.2d 709 (2d Cir.), *cert. denied,* 371 U.S. 826 (1962) (exculpatory tariff); *Lichten v. Eastern Airlines, Inc.,* 189 F.2d 939 (2d Cir. 1951) (tariff rule on liability).

the agency with a suggested method of meeting the problem directly and seek to obtain specific Board approval.[9] Thus an award of punitive damages with respect to past conduct in no way interferes with the agency's ability to carry out its regulatory policies in the future, just as Judge Fahy noted in his dissent (Pet. App. A 53) and as this Court held in *Carnation.*

CONCLUSION

Respondent advances arguments which, if adopted by this Court, would distort the regulatory scheme embodied in the Federal Aviation Act. Although the Act gives the CAB no power to approve deceptive practices, Respondent would have the Court allocate such power to it. Although the Act provides for preservation of common law remedies, Respondent would deprive the courts of their common law powers and reassign them to the CAB. Although the Board itself has adopted a regulatory scheme which includes common law remedies as an integral feature, Respondent would have the Court replace that scheme with one in which the carriers could be shielded from accountability through retroactive administrative determinations. Finally, although the Act requires the Board to decide whether or not to investigate and order prospective relief under section 411, Respondent would have the Court require the Board to make such an investigation, and to determine whether or not Respondent's past conduct should be insulated from liability. Petitioner respectfully

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[9] Indeed, this is precisely what one carrier did with an innovative tariff providing for a non-deceptive overbooking system which the Board approved in 1971. See *Delta Airlines, Inc. v. CAB,* 455 F.2d 1340 (D.C.Cir. 1971).

urges this Court to reject these arguments, and to permit the victims of deceptive airline practices to pursue their common law remedies.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-455

RALPH NADER, *Petitioner*

v.

ALLEGHENY AIRLINES, INC., *Respondent*

On Writ of Certiorari from the United States Court of Appeals for the District of Columbia Circuit

BRIEF AMICUS CURIAE OF THE AIR TRANSPORT ASSOCIATION OF AMERICA ON BEHALF OF:

Alaska Airlines, Inc.
American Airlines, Inc.
Braniff Airways, Inc.
Continental Air Lines, Inc.
Delta Air Lines, Inc.
Eastern Air Lines, Inc.
Frontier Airlines, Inc.
Hughes Airwest
National Airlines, Inc.
North Central Airlines, Inc.
Northwest Airlines, Inc.
Ozark Air Lines, Inc.
Pan American World Airways, Inc.
Piedmont Aviation, Inc.
Southern Airways, Inc.
Texas International Airlines, Inc.
Trans World Airlines, Inc.
United Air Lines, Inc.
Western Air Lines, Inc.
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February, 1976

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COMES NOW, the

Air Transport Association of America on behalf of Alaska Airlines, Inc., American Airlines, Inc., Braniff Airways, Inc., Continental Air Lines, Inc., Delta Air Lines, Inc., Eastern Air Lines, Inc., Frontier Airlines, Inc., Hughes Airwest, National Airlines, Inc., North Central Airlines, Inc., Northwest Airlines, Inc., Ozark Air Lines, Inc., Pan American World Airways, Inc., Piedmont Aviation, Inc., Southern Airways, Inc., Texas International Airlines, Inc., Trans World Airlines, Inc., United Air Lines, Inc., Western Air Lines, Inc., and Wien Air Alaska, Inc., pursuant to Rule 42(2) of this Court, and hereby respectfully files the attached brief amicus curiae on behalf of Petitioner, Allegheny Airlines, Inc.

Written consent to the filing of such brief has been received from both parties. Copies of their consents have been filed with the Court.

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BRIEF AMICUS CURIAE OF THE AIR TRANSPORT ASSOCIATION OF AMERICA

PROCEEDINGS BELOW

This case was tried in the U.S. District Court for the District of Columbia. The opinion of the trial judge is reported at *Nader* v. *Allegheny*, 365 F. Supp. 128, (D.D.C. 1973).

The appeal was heard in the US. Court of Appeals for the District of Columbia Circuit. The opinions

of that court are reported at *Nader* v. *Allegheny,* 512 F.2d 527 (D.C. Cir. 1975).

A request for rehearing *en banc* was suggested by Ralph Nader and the Connecticut Citizen Action Group. On June 23, 1975, the Court unanimously ordered that the request for rehearing *en banc* be denied.

Ralph Nader petitioned the Supreme Court of the United States for a writ of certiorari. The writ was granted on November 11, 1975.

INTEREST OF AMICUS CURIAE

The air carriers filing this brief, *amicus curiae,* are all U.S. federally certificated scheduled route carriers. All of the federally certificated scheduled route carriers accept advanced reservations; all are subject to the CAB regulations concerning denied boarding compensation (14 CFR 250 §§ 250.1 *et seq.,* (rev'd 1975)); all have established priority rules and criteria for determining which passengers shall be denied boarding on an oversold flight and filed such criteria with the CAB; and all have experienced overbooked and oversold flights.

Judge Richey, in his Conclusions of Law, determined that the defendant, "to deter others from such conduct," was "liable to both plaintiffs for punitive damages for their misrepresentation. [Further], although the proven damages are a nominal sum, the plaintiffs may recover punitive damages." (365 F. Supp. 128 at 133).

Thus, although it is clear that the judge knew that overbooking and overselling occur on an industry-wide basis, he was either unaware of the long regulatory history behind reservations practices and procedures or chose to ignore it.

The Court of Appeals, on the other hand, observed that the problems of overbooking ". . . are as wide as the industry itself. . ." and that "industry-wide resolution is appropriate. . . ." (512 F.2d 527 at 544). We agree with this assessment of the overbooking problem.

We do not take a position on the question of the compensatory damages which may be justified in this instance. Nor do we take the position that provable compensatory damages may not be awarded in appropriate cases. However, we do take the position that this is a contract case, not a tort case, and damages, if any, cannot include a punitive award to "deter others." We are the "others" and we submit that the regulatory agency which is deeply involved in this subject has and should continue to regulate air transportation problems such as overbooking in the public interest.

QUESTIONS OF FACT AND LAW WHICH HAVE NOT BEEN AND WILL PROBABLY NOT BE ADEQUATELY PRESENTED BY THE PARTIES

The issue, as presented to this Court by the Petitioner, assumes the existence of fraudulent misrepresentation and is intended to progress the Petitioner toward his ultimate goal of punitive damages. Consequently, Amicus believes that the following questions of fact and law have not been, and there is reason to believe they will not be, adequately presented in the briefs of the parties.

1. Responsible overbooking and the possibility of limited overselling are contemplated by the Civil Aeronautics Board approved system of denied boarding compensation as being in the

public interest and therefore do not constitute fraudulent misrepresentation.

2. Where responsible capacity management exists under a system found by the appropriate government regulatory agency to be in the public interest private action resulting in punitive damages would be totally inappropriate.

The questions of law and fact which Amicus desires to brief are extremely relevant to the issues in this case, especially the situation created by the fact that the Civil Aeronautics Board since 1946 has examined airline reservation practices and in 1967 promulgated specific economic regulations concerning these practices.

STATEMENT OF THE CASE

A. The Facts

In this case, here before the Court on a writ of certiorari, Ralph Nader (Nader) held a reservation on an Allegheny Airlines (Allegheny) flight which was overbooked by the carrier. At the time the flight was scheduled to operate, Nader, having arrived 10 minutes prior to departure, was not able to board the aircraft because it was full. Therefore, he was an oversold passenger.

Nader was offered an alternate flight by Allegheny which would have placed him at his destination fifty-five minutes later than his original arrival time. He refused this flight and requested that the carrier's ramp agent determine whether standbys had boarded or whether anyone would voluntarily give his space to Nader. The agent, who testified that he was following usual Allegheny approved procedures, refused to do this. As a result, Nader took an Eastern Air Lines flight to Boston and from there travelled by car to his

destination. He did not reach his destinations, Hartford and later Storrs, Connecticut, in time to address the Connecticut Citizen Action Group (CCAG) gathering.

The sponsors of the fund-raising rally Nader was to address, Connecticut Citizen Action Group, filed as joint plaintiffs in the case, alleging reliance on Allegheny Airlines to transport Nader on time. As a result, CCAG alleged it was discredited as an affective environmental organization, particularly in view of the fact that CCAG was founded by Nader. In addition, CCAG alleged it lost possible monetary contributions from possible rally participants.

B. Opinion of the Trial Court

In an opinion written by Judge Charles R. Richey, the District Court found that Allegheny has a practice of systematically overbooking; that the carrier's overbooking is substantial; that the carrier is aware that there are oversales resulting from the overbooking practice; and, that oversales result in distress and financial loss to persons relying on confirmed reservations. Judge Richey noted that Allegheny did not notify the public in its advertising of its overbooking practice, or, the risk of oversale and consequently found that Allegheny intentionally conceals its overbooking practice.

Judge Richey acknowledged the existence of the Civil Aeronautics Board's denied boarding rules (14 CFR 250 §§ 250.1 *et seq.*, (rev'd 1975)); but, he concluded that the Board gave to the passenger the option of receiving compensation or going to court. In briefly discussing this point, Judge Richey stated that the CAB ". . . has not attempted to directly regulate the reservations practices of Allegheny or any other air-

line. . . ." (365 F. Supp. 128 at 131). In this connection Judge Richey found that, "the public [is not] advised in detail of the over-booking practice in the tariffs filed with the CAB or of the fact that all members of the Air Transport Association, of which the Defendant is a member, intentionally sell more tickets than they have seats for their particular flights. . . ." (365 F. Supp. 128 at 131).

In awarding damages to Nader, Judge Richey ruled that the claim for damages in this case arose out of the Carrier's "discrimination, fraudulent misrepresentation and intentional tortious conduct." (365 F. Supp. 128 at 132). He found concealment of the overbooking practice, and Allegheny's failure to take steps to avoid injury to Plaintiff Nader "is tantamount to willful and wanton misconduct which gives rise to and provides a proper basis for each of the Plaintiffs' claims for damages." (365 F. Supp. 128 at 132).

Thus, it was the view of Judge Richey that Nader was entitled to compensatory ($10.00) and punitive damages ($25,000.00). As for CCAG, the Judge found that Allegheny, as a common carrier, should have foreseen that other members of the public would rely on its representation to honor reservations. Consequently, he awarded CCAG $51.00 in nominal damages and $25,000.00 in punitive damages. Judge Richey awarded the punitive damages to punish Allegheny and "to deter others" from conduct which he, apparently, found to be "outrageous." (365 F. Supp. at 133).

C. Opinion of the Court of Appeals

Judges Fahy, McGowan and Tamm heard the appeal of this case in the U. S. Court of Appeals for the District of Columbia Circuit. All three judges agreed

that the Connecticut Citizen Action Group is not within a class which could recover. All three judges agreed that punitive damages may not be awarded on the present record under Section 404(b), (49 U.S.C. 1374 (b)) of the Federal Aviation Act. All three judges agreed that the question of whether or not Nader is entitled to recover under Section 404(b) of the Act requires further consideration. Judges McGowan and Tamm concluded that:

> . . . . since the problems are as wide as the industry itself, a single industry-wide resolution is appropriate. Thus, in the absence of an existing Board decision disposing of this question, the issue of whether the air carriers' overbooking policies, including their policy of nondisclosure, may be characterized as a tortious misrepresentation must first be submitted to the Board to ascertain whether the conduct violates section 411. . . . . (512 F. 2d 527 at 544).

Judge Fahy dissented. He was of the view that ". . . the finding by the District Court of fraudulent misrepresentation is ripe for review now by this court without reference to the Board, under section 411, of the reservations practices of the airlines." (512 F. 2d 527 at 552). Again, Judge Fahy stated at the end of his dissent:

> . . . I respectfully dissent from that part of the decision of the court which defers decision of the Nader claim of fraudulent misrepresentation to await Board determination whether the reservation practices of the airlines' are deceptive. . . . (512 F. 2d 527 at 556).

SUMMARY OF ARGUMENT

A. History and Background of Overbooking and Oversales

We believe that the Court of Appeals recognized the need for consideration by the CAB because of the long history of the Board's continued involvement in this issue, because the Board has the expertise in the field, and because of the fact that the practice of overbooking is common to many of the nation's air carriers regulated by the Board. The Court of Appeals was of the view that the Congress had given the CAB the responsibility to regulate overbooking and the statutory power to carry out those responsibilities. Further,

> . . . as the Board has had occasion to point out in detail, in the broad area of air carrier reservations practices and procedures it is not confined narrowly to the tariff provisions of the Act but may use its ample rulemaking authority, . . . to promulgate regulations required in the public interest. (*Emergency Reservations Practices Investigation*-Docket 26253, Initial Decision of Robert L. Park, Associate Chief Administrative Law Judge, Civil Aeronautics Board, at 54 (June 10, 1974) (hereinafter referred to as *Emergency Reservations Practices Investigation*)).

Thus, the Court of Appeals felt that:

> . . . this power must be read broadly to include the approval in the public interest of some practices that might be considered common law misrepresentations. The effect of such approval, or a holding that they do not represent deceptive practices, would be to establish that the practices as a matter of law, do not constitute common law misrepresentations. (512 F.2d 527 at 543).

To this view the Court footnoted a reminder that final decisions of the CAB are subject to review by the Court

of Appeals (Federal Aviation Act of 1958, § 1006, 49 U.S.C. 1486).

In support of maintaining the CAB's control over this matter, we believe it would be helpful to recite some of the history and background of overbooking and oversales for consideration by this honorable Court. Indeed, the Court of Appeals stated that ". . . this background becomes especially relevant in considering the misrepresentation issue." (512 F.2d 527 at 537).

A sharp distinction exists between overbooking and overselling airline flights. Whether done knowingly on the basis of a flight's historical performance, or inadvertently, overbooking is a condition which exists prior to the date and time of a flight departure. Conscious pre-departure overbooking recognizes the fact that within the last 24 to 48 hours before scheduled flight departure there is a substantial turnover in reservations on most flights, and that a substantial number of "no-shows" materialize at the last minute. Overselling, by contrast, results only in those instances when, at the time of departure, the reservations turnovers and the number of "no-shows" have not produced enough seats to accommodate all booked passengers. Actual oversale conditions are relatively few in number, in comparison to the vast number of passengers who are accommodated daily. The airline industry takes care to monitor its various flights and to do all technologically possible and economically feasible to avoid actual oversales.

Thus, we believe it is important to understand the nature of airline practices with regard to overbooking. "The successful growth and development of air transportation has been aided in significant measure by the flexibility of the industry's reservations practices and procedures which make airline services easily available to the public." (*Emergency Reservations Practices*

Investigation, at 8). The reservations system is not one where the airlines indiscriminately sell more seats than are available on all flights and then hope for the best. Overbooking is one feature of a comprehensive program of flight-by-flight capacity management, involving underbooking as well as overbooking, which airlines undertake in an effort to accommodate the maximum number of passengers with a minimum amount of inconvenience.

Generally, such capacity management programs involve the daily review of systemwide flight bookings by a highly trained and experienced team of senior airline reservations personnel. These capacity management teams have access to the most complete information that airline computers can provide. Such information will reflect the historical relationship of actual traffic to bookings on the same or comparable flights, in the same direction, between the same city pairs, at the same time of day, and on the same day of the week. Such data is available on a flight-by-flight basis for the same date a year earlier, or for the most recent week or month. Typically, the date will indicate that certain flights or flight segments historically have a relatively constant pattern of "no show" passengers while others do not. For each segment where "no-shows" can be anticipated on a regular basis, the capacity management team may decide to accept a certain number of reservations in excess of capacity. The number of such "overbookings" is fixed in relation to "no-show" ratios indicated by experience, but generally this is performed with a margin for error aimed at minimizing the risk of actual oversales.

> The carriers themselves have taken a number of steps designed to combat and minimize the no-show. These include (1) 'firming' space critical flights by contact with passengers holding reservations to assure that their space will be utilized; (2) computerized 'dupe' checks to identify and seek to eliminate multiple reservations; (3) performing manifest check-in or post-departure reconciliation procedures for at least selected heavily booked flights; and (4) canceling down-line reservations of known no-shows. Not infrequently, carriers undertake to impose times of ticket pickup and airport check-in in advance of scheduled departure, but rarely does non-observance of these requirements result in cancellation of space. (*Emergency Resevations Practices Investigation*, at 10).

The decision as to how many reservations to accept is usually first made several weeks before a flight is scheduled to depart. It is thereafter reviewed regularly until just before the flight. Actual bookings, cancellations and ticket pickups are examined and measured against the forecast. The number of seats available for sale is then adjusted to take account of this new information. At certain peak times, extra sections may be added. In any case, as the date of a flight approaches and more information becomes available, the ability to project actual traffic in relation to bookings improves. While the final decisions as to how many bookings to accept are far from perfect, they are as accurate as computer technology and experienced judgment can determine. More important, the practice of making these judgments means that literally millions of airline seats are sold and used each year by persons who otherwise would be needlessly denied space. "If the thought is that there has been substantial aggravation of the denied boarding problem in recent years, such facts as are available indicate the contrary." (*Emergency Reservations Practices Investigation,* at 4).

The same procedures which allow bookings in excess of seats sometimes dictate underbookings. This can

occur for many reasons, particularly where tickets are written by agents or personnel of other airlines. Domestic flights which tend to carry a high proportion of international connecting passengers are an example. Whatever the reason, slower communications, clerical errors compounded by language differences or inadvertent error at the foreign point of origination, the domestic carrier may find itself regularly confronted with more passengers than its records indicate. In such cases, reservations are limited to fewer seats than the capacity of the airplane. Underbookings may also occur where a carrier anticipates that for some reason, such as anticipated high temperatures, shortened takeoff distances as a result of runway construction, extra fuel loads, or other payload restrictions, full occupancy of the airplane will not be possible.

It should be emphasized that the vast majority of flights are neither underbooked nor overbooked. These are the instances where experience indicates that the carriers' reservations records are on the average a reasonably accurate indication of actual traffic. Here too, however, the decision not to overbook or underbook is reviewed constantly in light of actual experience. "Moreover, no known serious abuses of or dislocation in the present reservations systems have occurred." (*Emergency Reservations Practices Investigation,* at 39).

There is nothing fraudulent about overbooking procedures. They are a necessary part of airline operations if those operations are to be conducted economically in the public interest. More importantly, the CAB has held public proceedings concerning airline overbooking procedures. For the convenience of the Court we are attaching, as an appendix to this brief, a

chronological history of relevant air carrier and government regulatory actions in connection with reservations procedures which we believe must be considered in any decision in this case. As can be seen from the Appendix, overbooking has had a great deal of careful attention by the CAB over the years.

The causes of overbooking are complex. The airline industry has been plagued from the earliest days of its history with passengers who do not show up to occupy confirmed reserved space whether because they have changed their plans, or, because they have engaged in multiple booking on various flights to accomodate uncertainty as to the time they wish to depart. This situation was first recognized by the carriers shortly after World War II. Unfortunately, the carriers at that same time were experiencing a shortage of capacity. Many passengers created economic problems for the carriers, and serious transportation problems for potential passengers, when they failed to show up for their flights and forced carriers to depart with empty seats. Various approaches have been attempted to resolve this situation; but, it is still an integral part of the nature of the system.

Despite carrier attention to and concern about the overbooking problem, oversales do occur. The record of regulatory attempts to deal with this matter clearly demonstrates that it is a complex problem which requires expert examination and consideration of the public interest and airline economics. (Appendix). The CAB has continuously and expressly maintained jurisdiction over this subject in order to conduct such examinations and render appropriate decisions and should continue to act appropriately.

The language of the CAB in an early notice of proposed rulemaking (EDR-109) dated January 10, 1967, clearly displays its own conclusion that intentional and controlled overbooking practices are in the public interest:

> There is nothing in the substantial body of data before the Board which controverts the carriers' claim that overbooking is not the major cause of oversales. (at 5).
>
> * * *
>
> In our view any realistic appraisal of the practice of overbooking leads to the conclusion that, while it results in oversales, it also contributes to flexibility and freedom in securing, changing and cancelling reservations. Thus, any rigid controls over overbooking, as now practiced, would inevitably lead to restrictions on privileges which contribute greatly to the convenience of air transportation, and have come to be relied upon by the traveling public. In addition such controls would reduce load factors, and the additional cost would ultimately have to be borne by the traveling public.
>
> In light of the above, it can be seen that the present reservations systems of the carriers in general benefit the traveling public. (at 6)..
>
> * * *
>
> It is apparent from the foregoing that the present reservations system of the carriers is designed to provide maximum benefits for the traveling public and to reduce the carriers' reservations costs. (at 9).

In its notice of proposed rulemaking dated June 4, 1973, (EDR-248) the Board, citing prior rulemaking orders, stated:

> The [denied boarding] rules are intended, *inter alia*, (1) to prevent unlawful discrimination or undue or unreasonable prejudice in connection with determining priorities among overbooked passengers, (2) to provide prompt, effective and adequate compensation to passengers denied boarding, and (3) to encourage the carriers to improve their performance with respect to oversales.

As noted by the Court of Appeals (512 F.2d 545 at 546) the CAB has pending before it in Docket 26253 the "*Emergency Reservations Practices Investigation.*" In that *Investigation,* Judge Park, having knowledge that "[a]ll carriers, however, engage in deliberate overbooking—or 'planned capacity management' as it is referred to by some—to help offset the effects of the no-show, late cancellations, and the like. . . .", (*Emergency Reservations Practices Investigation*, at 10) found that ". . . no known serious abuses of or dislocations in the present reservations systems have occurred." (*Emergency Reservations Practices Investigation,* at 39). While Judge Park did say the question of whether or not to prohibit overbooking ". . . was not specifically placed in issue" in the Investigation, he further stated on the same question ". . . nor does the record provide any persuasive basis for wholly outlawing the practice . . ." as was suggested during the *Investigation* by the Nader-directed Aviation Consumer Action Project. (*Emergency Reservations Practices Investigation,* at 27). Indeed, Judge Park, in dealing with the Board's proposal to change denied boarding compensation, found:

> If the public does in fact lack faith and confidence in the present reservations systems it is not evident

from this record. Nor has any cause and effect relationship been demonstrated between the refund penalty, on the one hand, and tripling denied boarding compensation, on the other hand, for a passenger who is a no-show and must pay the penalty cannot be, at the same time, eligible for denied boarding compensation. Without some such causal connection or a substantial element of public distrust the tripling proposal, or a proposal for any increase for that matter, loses all logical support and validity. (*Emergency Reservations Practices Investigation*, at 51).

ARGUMENT

I. Responsible Overbooking and the Possibility of Limited Overselling Are Contemplated by the Civil Aeronautics Board Approved System of Denied Boarding Compensation as Being in the Public Interest and Therefore Do Not Constitute Fraudulent Misrepresentation

The issue before the Court, as framed by the Petitioner, assumes the existence of a fraudulent misrepresentation. The Trial Court made a finding of fraudulent misrepresentation; but, the Court of Appeals stated that ". . . there is absolutely no probative evidence in the record to support a specific finding of an affirmative misrepresentation. . . ." (512 F. 2d at 541) and later stated that ". . . we reverse the finding that Allegheny affirmatively represented to Nader that he had a guaranteed reservation for a seat because it is clearly erroneous and without evidentiary support." (512 F.2d at 542). The Court of Appeals went on to say that the practice of overbooking could be considered to be a "nonrepresentation" rather than a misrepresentation. The Court remanded to the CAB the threshold question of whether or not the practice of overbooking is deceptive. If the practice is not deceptive then it cannot be a common law misrepresentation. (W. Prosser, Law of Torts 713-714 (3rd ed. 1964)).

The Civil Aeronautics Board had the question of whether overbooking is a deceptive practice, or not, before it in the *National Airlines, Inc., Enforcement Proceeding*, 31 CAB 390 (1960). In that proceeding the Board decided that the enforcement case against one carrier was too limited in scope to decide the issue of overbooking. As a result, the Board instituted the *Overbooking Practices of Trunkline Carrier Investigation*, CAB Order E-15615 (1960). As will be evident from a glance at the Appendix we have attached to this brief, the CAB, in the years following the 1960 proceeding, has been deeply involved in the overbooking issue. Since the 1960 proceeding several proposals have been submitted to the Board including a proposal promulgated by the Board itself on October 12, 1965, in Economic Draft Regulation No. 95 (EDR-95) which *inter alia*, would require that carriers give passengers a notice that the flight they wished to take was overbooked, if such were the case. This notice was proposed to be given no later than 12 hours prior to flight time. Such a direct notice would have eliminated any possibility of an allegation of concealment. However, the Board, after due consideration specifically rejected that idea in EDR-109 dated January 10, 1967. The Board concluded (in EDR-109) that the practice of overbooking had ". . . worked reasonably well in the public interest. . . ." This could only lead the nation's air carriers to believe that continuance of the practices had approval by the appropriate government regulatory agency.

Administrative Law Judge Park echoed long standing Board philosophy when he stated that, "while the

carriers are correct in their conclusion that existing carrier rules and practices at issue are not presently unlawful it does not follow that the Board is therefore powerless to adopt a contingent program designed to protect the air transportation system and the travelling public from potential harm." (*Emergency Reservations Practices Investigation,* at 54).

We believe that, whether or not the issue returns to the CAB or goes to the District Court, it is clear that no evidence exists that the practice of overbooking amounts to fraud through misrepresentation or otherwise. On the other hand, the long record of regulatory interest and action on this subject by the CAB is abundant evidence of the government's determination that the practice is in the public interest. Stated another way, the CAB began its inquiry in the *National Airlines, Inc., Enforcement Proceeding,* cited above, on the theory that a particular carrier might have been involved in a deceptive practice. The Board then determined that the practice was not peculiar to a single carrier. Then, after further examination, the Board determined that the practices engaged in were in the public interest. It is generally well recognized that deception is a basic element required to establish a fraudulent practice. We contend, therefore, that since there is no deception in the practices followed, there can be no fraud.

Thus, as stated before, while we take no position on damages under contract theories, we strongly urge the Court to make it clear that this is not a case which can be decided under tort theories. In this connection, we believe it follows that punitive damages would be inappropriate and should not be awarded.

II. Where Responsible Capacity Management Exists Under a System Found by the Appropriate Government Regulatory Agency To Be in the Public Interest Private Action Resulting in Punitive Damages Would Be Totally Inappropriate

As the Court will ascertain from the decisions below and from the brief of the Petitioner, a basic aim of the Petitioner is the award of punitive damages.

Our view that punitive damages cannot properly be awarded is especially relevant when consideration is given to the impact of such an award. In the language of Judge Friendly, "[w]hat strikes one is not merely that these torts [for which punitive damages historically have been awarded] are intentional but that usually there is but a single victim; a punitive recovery by him ends the matter, except for such additional liability as may be provided by the criminal law." (*Roginsky* v. *Richardson-Merrell, Inc.,* 378 F. 2d 832 at 838, (2nd Cir. 1967)). The Judge went on to say that the court had "the gravest difficulty in perceiving how claims for punitive damages in such a multiplicity of actions throughout the nation can be so administered as to avoid overkill." (378 F. 2d 832 at 839).

While the *Roginsky* case involved punitive damages in product liability cases, we believe the same "overkill" that bothered the Court there applies to those cases involving overs[illegible]les of air transportation services. The figures cited by the District Court in this case alone exemplify the very problem which exists here with punitive awards. Finding of Fact No. 12 of the decision states that Allegheny "bumped 945 persons" in April, 1972. Hypothetically, applying the Nader award to all persons oversold by Allegheny from January 1969 through August 1972, it would have cost Alle-

gheny $398,225,000. Such a figure is reached by using the $25,000 awarded to Mr. Nader; if third parties received additional awards, the figure obviously would be substantially higher. For almost the same period (January, 1969 through the third quarter of 1972) Allegheny received approximately $586,789,000 in gross passenger revenues from scheduled flights. This figure is, of course, subject to taxes, operating expenses, etc. Thus, potential damage claims could amount to ⅔ of the gross revenues from passenger transportation on scheduled flights prior to taxes and operating expenses.

We believe these figures as applied to Allegheny clearly demonstrate the "overkill" possibilities which alarmed Judge Friendly. In using the fiscal year 1973 total of 75,925 domestic passengers denied confirmed space (as reported to the CAB), the possible industry exposure was calculated at $1,898,125,000, or approximately two billion dollars. Again this total does not include exposure to third-party claims. It should be noted that, the entire certificated schedule carrier industry took in approximately $9,763,599,000 in fiscal year 1973 in scheduled passengers revenues. From this amount the cost of operating, taxes, and other expenses would result in a figure considerably less than the amount shown as possible industry exposure. Continuing, hypothetically, this would fiscally mandate the demise of a privately owned commercial airline industry.

Certainly not all passengers denied confirmed reserved space would receive a court award of $25,000. Some would make no claim; some would accept the Part 250 (14 CFR 250 §§ 250.1 et seq., (rev'd 1975))

denied boarding compensation; some might be awarded more. The CAB *Investigation* of 1974 determined that, "no real contention much less a showing, has been made that present levels of denied boarding compensation are not compensatory or that they are otherwise inadequate to make the passenger whole, which was the fundamental underlying purpose for enactment of the regulation." (*Emergency Reservations Practices Investigation,* at 51). But clearly, under the District Court opinion, the possibility exists for enormous outlays of money. Further, the CAB's economic regulation

> Part 250 was first enacted in 1967 in an effort to 'provide prompt, efficient and adequate compensation' to passengers who for one reason or another are denied boarding by air carriers. The prescribed level of compensation, which has remained unchanged since enactment of the regulation was considered adequate in a general way to make the passenger 'whole' and to compensate him for the 'inconvenience, distress, and, in many cases, hardship and monetary loss resulting from an oversale'. (*Emergency Reservations Practices Investigation,* at 27-28).

The public policy basis for awarding punitive damages does not exist here.

> The airline passenger has substantial freedom of choice to make reservations at carriers' offices or through agents and to cancel them by telephone or in person. Also, should a ticketed passenger have a change of plans, he is free in most situations to use his ticket on flights of other air carriers without endorsement. A system with such built-in mobility for the passenger inevitably breeds the deliberate no-show who, in times when airline seats are in short supply, will undertake to protect him-

self by making multiple reservations which he is free to disregard with impunity. (*Emergency Reservations Practices Investigation,* at 8-9).

The cases, some of which are cited in the opinion of the District Court (365 F. Supp. at 133), when awarding punitive damages generally do so on a public policy basis.

On the other hand, the CAB found the overbooking practices to exist in the public interest (EDR-109). The public interest cannot be determined in such mutually exclusive ways on the same point. The view of the Board which was created to be the expert in aviation matters, having dealt with this specific subject, must be preferred.

If carriers are forced to drop controlled reservations procedures, empty seats on airplanes will concomitantly greatly increase, causing high losses of revenue to carriers and immeasurable inconvenience to the public. In either event, whether attributable to the rise is costs due to high damage awards, or, a drop in revenues due to unsold seats, there can be no doubt that the consumer would eventually bear the burden if the District Court's decision on punitive damages is allowed to stand. Thus, we submit that a punitive damages award in this type of case is both inappropriate and unwarranted.

If the present procedures of the Board necessitate more restrictive treatment of the carriers, it is for the Civil Aeronautics Board with its expertise to make appropriate changes in existing rules and practices to safeguard the public interest. The Court of Appeals itself stated that "[w]e think that the decision in the *Emergency Reservations Practices Investigation* should substantially resolve whether the practices at

issue are deceptive within the meaning of section 411." (512 F.2d 527 at 546).

In order to prevail, an oversold passenger must establish himself as the target, express or implied, of a willful and outrageous tort. (e.g., see *Fitzgerald* v. *Pan American World Airways, Inc.,* 229 F.2d 499 (2nd Cir. 1956)). We believe that special and wrongful treatment directed at a specific individual should be the only grounds for punitive damages. In our view, this is demonstrably absent in the present situation. The carrier, in the instant case, did not engage in conduct which was knowingly and willfully tortious. The long history of regulatory activities in this area, the monthly CAB public statements showing airline denied boarding statistics, the existence of Part 250, the public distribution of a booklet by the CAB on consumer rights including denied boarding and, especially, the tariffs on denied boarding compensation all stand to refute the allegations of concealment and deception. As previously stated, without deception there cannot be a tort based on misrepresentation and without a tort we fail to see any basis for an award of punitive damages.

In short, we believe the District Court was in error in awarding punitive damages in the case of each plaintiff, and we respectfully urge this Court to uphold the Court of Appeals decision on punitive damages. As stated previously, we take no position on the appropriateness of compensatory damages.

CONCLUSION

The regulatory history on airline overbooking and oversales and the case law surrounding denied boarding by airlines demonstrates that the District Court's decision with respect to the punitive damages awards in

this case must not be allowed to stand and the decision of the Court of Appeals on the matter of punitive damages must be affirmed. This does not mean that any right of action must be eliminated; but, it does mean that the right of action, if pursued, must not result in a windfall.

Clearly, the remedy for an individual who has an oversale claim is the right to accept denied boarding compensation, or substituted service under the CAB regulations, or to sue in court for actual or compensatory damages incurred through the breach of contract. It follows from this that those not directly involved in the contractual relationship do not have a claim absent an extraordinary showing by such a plaintiff that the contracting parties (including specifically the carrier) contemplated that the transportation was being afforded for the benefit of a third party.

Programmed overbooking by carriers, in the public interest, is contemplated by the appropriate agency in charge of regulating airline practices and procedures. This proposition was most recently accepted by the House of Lords in *British Airways Board* v. *Taylor,* (*The Times* (London), December 11, 1975, at 5) decided on December 10, 1975, which held that:

> Their Lordships were not concerned with whether that policy (overbooking and overselling) was commercially sound or unsound, fair or unfair to passengers generally, operated conscientiously or otherwise. Such questions were primarily within the control of administrative authorities, the Civil Aviation Authority, or the Secretary of State in this country, and similar bodies elsewhere.

The Civil Aeronautics Board is clearly the sort of "similar body" to which the House of Lords referred.*

Respectfully submitted,

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* It should be noted here that England, unlike the United States, does not have a rule or regulation requiring the filing of tariffs which incorporates a predetermined system of denied boarding compensation.

APPENDIX

APPENDIX

Background of C.A.B. and Carrier Actions Concerning Reservations Practices

Date	CAB Order/ CAB Reports	Description
8/25/46		Tariff filings by all U.S. domestic airlines, except Colonial, aimed at eliminating "no-show" problems, comprising (1) necessity of a ticket for a confirmed reservation (2) necessity of reconfirmation.
10/15/46		Second phase of industry procedures to combat "no-show" problems—Tariff rule initiating "no-show" penalty of 25% or $2.50 whichever was greater—Tariff terminated 8/10/47.
3/14/54		Tariff rule filings by U.S. domestic air carriers initiating "no-show" penalty of $5.00 or 20%, whichever was greater, applicable to tourist class only. Passengers under this rule could cancel up to 3 hours prior to departure. Rule terminated 10/15/55.
4/29/55	E 9164	CAB authorized discussions by carriers concerning proposals to cope with the "no-show" and multiple reservations problems.
8/17/56	E 10545	Approval of ATC resolution to adopt "Phase I" regarding "no-shows" and multiple reservations and that carriers had tentatively reached an agreement on the assessment of penalties for late cancellation of reservations and for "no-shows". Allowed further discussion on "Phase II", the penalty portion of the subject.
2/6/57	E 11007	Extended time period for discussions. In this order the Board notes its concern that such discussions could lead to a request for fare increases. It therefore conditioned the discussion authority in order to separate reservations charges from basic travel charges.

Date	CAB Order/ CAB Reports	Description
4/26/57	Dockets 8725, 8726	Complaint of CAB enforcement attorney against Delta Air Lines and Eastern Airlines alleging the practice of overbooking constituted an unfair and deceptive practice and unfair method of competition within the meaning of Section 411 of the Federal Aviation Act and that a self-imposed penalty paid by the carrier to oversold passengers constituted a tariff violation under Section 403 of the Act.
5/13/57	Docket 8761	Complaint of CAB enforcement attorney against National Airlines alleging, *inter alia*, intentional overbooking practices.
8/6/57	E 11658	Approval of ATC agreements (No-Show Control Plan) which, *inter alia*, established a "no-show" penalty. The Board stated " . . . the oversale of space could result from several factors, including overbooking, which the Board earlier informed carriers would constitute a violation of the Act if done deliberately. There are now pending enforcement actions against two carriers which had allegedly engaged in this practice, and the Board intends to take whatever further steps may be appropriate to insulate the public from any such practices as it may find." The Board went on to say " . . . the failure of a passenger to cancel or use reserved seat space poses a serious economic and service problem to both the airlines and all air travelers. Many times a fully-booked flight will take off with empty seats that could be used by other passengers, because prior seat reservations were made by persons who failed to pick up or cancel their reservations. This results in handicapping the economic earning power of the air carrier and in denying air transportation to the public."
12/16/57	E 12025 26 CAB 732	Consent Cease and Desist Order finding Delta had violated Section 403(b) of the Act through refunding or remitting cash settlements and other things of value to oversold delayed or inconvenienced passengers.

Date	CAB Order/ CAB Reports	Description
7/22/58	E 12817	Board approval of ATC agreements which provided for termination of the No-Show Control Plan as of 90 days following the 1958 Spring ATC Meeting but no later than August 1, 1958.
7/26/60	E 14962 30 CAB 862	Termination of enforcement proceeding involving Eastern Air Lines for failure, after hearing, to establish allegations of enforcement complaint and finding that overbookings occurred due to human failure and errors beyond the carrier's control. Decision also states that a rulemaking proceeding will be instituted to determine and define the duty of an air carrier to notify an overbooked passenger upon discovery that its records indicate that the space, at that time, is not available.
8/4/60	E 15614 31 CAB 390	Dismissal of enforcement proceeding against National Airlines insofar as it relates to intentional overbooking admitted by the carrier to have occurred. The Board was of the view that problems of intentional overbooking may more appropriately be explored in an industry-wide investigation.
8/4/60	E 15615	Order instituting investigation of overbooking practices of trunkline carriers. Noting that the *National Enforcement Proceeding* brought before the Board for the first time the practice of intentional overbooking, the Board instituted its investigation " . . . so that it might fairly and adequately assess the conflicting interests and policy considerations involved."
10/11/60	E 15905	Order of investigation of Eastern Airlines local "Air-Bus" fares which incorporated provisions which proscribed a forfeiture of the purchase price of the transportation where a passenger fails to present a ticket for refund at least 24 hours prior to scheduled departure time in order to alleviate problems stemming from "no-show" passengers. Experiment of "Air-Bus" allowed to proceed.

Date	CAB Order/ CAB Reports	Description
4/27/61	E 16729 33 CAB 1033	Dismissal of complaint against Eastern "Air-Bus" fares and dismissal of investigation ordered on 10/11/60 in E 15905. Institution of investigation of voluntary refund rules incorporated in carrier's tariff.
9/28/61	E 17515	Order authorizing certificated route carriers to engage in discussions (a) to discuss ways and means of curtailing "no-shows" including the imposition of penalties and (b) to consider problems relating to in-flight services and possible charges thereto.
1/8/62	E 17914	Order tentatively approving an agreement (Reservations Service Charge Plan) of 11 trunkline carriers which agreement imposed the following rules: The passenger must purchase his ticket 24 hours in advance or supply billing information for the collection of any penalty that might be assessed. The penalty imposed was $5.00 or 50%, whichever is greater, to a maximum of $50.00 unless the passenger is able to present documentary evidence of cancellation. To these rules the Board added that denied boarding compensation should be paid in the event of oversales with a minimum of $25.00 or 50% of the applicable one-way fare of the first remaining coupon, whichever is greater. The Board also established that the rules be the subject of a six month experiment. In this order the Board found, *inter alia:* "The Board is cognizant of the inherently complex nature of the reservation and ticketing aspects involved in the sale of air transportation, and of the need to improve further the reservation procedures. The adoption of ticketing time limit standards represents, in the Board's view, a desirable move. The Board was also aware of the long-standing economic and service problem to the airlines and air travelers alike resulting from the failure of ticketed passengers to cancel or use reserved seat space. Thus, a fully booked flight may actually depart with unoccupied seats that could

have been used by other passengers, because prior seat reservations were made by persons who failed to use or cancel their reservations. This problem has resulted in a handicap on the earning power of the air carriers and has often resulted in a denial of available air transportation to the public. For these reasons, the Board believes that reservation and no-show controls are desirable. On the basis of the foregoing, the Board has tentatively concluded that the agreement should be approved subject to the terms and conditions hereinafter set forth and the receipt of comments from interested persons. (p. 3)

"The imposition of a reservations service charge on no-show passengers raises the related question of the procedures which should obtain in any instance where a passenger, who presents himself for carriage at the appropriate time and place, is not transported on a flight that operated and for which he held a proper ticket because of insufficient seats on the aircraft. (footnote omitted)

"The overbooking practices of the trunkline carriers have been the basis for numerous complaints to the Board and on August 4, 1960, by Order E-15614, the Board directed its staff to undertake a comprehensive investigation of this problem. The staff issued a report on July 28, 1961 setting forth its tentative findings and conclusions in the overbooking investigation (*Overbooking Practices of Trunkline Carriers*, Docket 11683). Facts developed in the investigation indicate that substantial overbooking, either inadvertent or intentional, does occur and while the percentage of oversales is not large in relation to the total volume of traffic handled, the number of persons inconvenienced by oversales is not insignificant. Therefore, the Board concludes that any program di-

Date	CAB Order/ CAB Reports	Description
		rected to a resolution of the no-show problem must consider also the oversale aspect of the reservations process and give weight to the carrier's, as well as the passenger's responsibility in confirming a reservation." (pp. 4, 5) (footnote omitted)
3/1/62	E 18064 35 CAB 881	Approval of "Reservations Service Charge Plan" subject to lowered maximum penalties for "no-shows" and denied boarding compensation from $50 to $40. The Board also exempted from the denied boarding compensation requirements those passengers not accommodated (1) because of fuel requirements, equipment substitution, etc., (2) when alternate arrangements provide for arrival of the passenger within 1 hour of his previously planned arrival time, and (3) if the passenger is downgraded or upgraded on the same flight. The Board also required the carriers to report monthly on this program.
4/27/62	E 18268	Order of investigation and suspension of carrier tariffs marked to become effective 5/1/62. The Board stated that it appeared that certain parts of the "No-Show and Oversale Penalty Plan" approved by Order E 18064 might allow a "no-show" passenger to escape penalty and that such a provision might be unjust and unreasonable and that practices of 13 local service carriers and helicopter carriers which varied from the trunkline plan might result in unjust discrimination or an undue preference and prejudice.
5/25/64	E 20859	Order deferring *Investigation of Overbooking Practices of Trunkline Carriers* which was instituted by Order E 15615 on 8/4/60, dismissing the "Reservations Service Charge Plan" of 11 carriers approved by Order E 18064 on 3/1/62 which expired by its own terms. This order required carriers to file monthly denied boarding compensation reports with respect to tariff rules filed by the carriers providing for the pay-

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Date	CAB Order/ CAB Reports	Description
		ment of such compensation for the carrier's failure to provide confirmed reserved space. The Board stated:

> "We do not propose, at this time, to take further procedural steps in the *Overbooking Practices of Trunkline Carriers Investigation,* Docket 11683, but we shall consider, in a separate rule making proceeding, the issuance of a rule prescribing the minimum obligation of the carriers to give notice to passengers of an overbooked condition at a reasonably practicable time prior to scheduled flight departure. We have noted the extensive information supplied by the carriers with respect to their practices in dealing with overbookings, notice to passengers of such situations and the priority procedures observed by them when oversales result at flight departure time. While the carriers all accept the obligation to advise passengers of overbooked conditions at some time prior to departure, the procedures for giving notice are not regularized, uniform or publicly available. In the rule making proceeding which shall be instituted promptly, we will broaden our consideration to include all scheduled carriers (excluding helicopter operators)." (p. 3)

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The Board went on to state:

> "Additionally, we expect all carrier parties to adopt, in the immediate future, appropriate procedures designed to fully inform the traveling public of the provisions of the denied boarding compensation tariff, including but not limited to the following:
>
> (a) The specific terms and amount of compensation;
>
> (b) The specific exceptions thereto:

Date	CAB Order/ CAB Reports	Description
		(c) A clear statement to the effect that the passenger is under no obligation to accept the proferred compensation in lieu of any present or future claim against the carrier.
		In this connection, we are directing each carrier party to submit for this record within 30 days of the issuance of this order, a detailed statement of the steps taken to acquaint the public with the basic features of the denied boarding compensation obligation of such carrier. Further, the carriers will be required to submit for the record any modifications in their notice procedures, within 30 days of implementation." (pp. 3, 4)
		Finally, the Board said:
		"... we wish to make it clear that our decision to defer does not signify in any way sanction of overbooking or overselling practices. The option of the Board to take further action in the Overbooking investigation at any time such action is warranted should be clearly noted." (p. 4)
8/13/64	E 21187	Order amending Order E 20859 and denying reconsideration. In this order the Board stated:
		"We recognize also that in terms of percent of total passengers handled, the number denied confirmed space is relatively insignificant, being only a fraction of 1%. However, the application of even this small factor to the total domestic enplanements would reflect that a considerable number of passengers are being inconvenienced. (footnote omitted) We believe that this number is

Date	CAB Order/ CAB Reports	Description
		sufficient to require that an effort be made to find a remedy." (p. 3)
		The Board also acknowledged that the count of the number of times a passenger is counted as being denied confirmed space is and should continue to contain duplications of statistical reporting.
10/12/65	EDR-95	By a notice of proposed rulemaking the Board proposed to require carriers to file tariffs establishing priorities for the removal or refusal of passengers in the event of oversales. It also proposed that carriers be required to give reasonable notice to passengers of overbooked conditions and, to that end, suggested a time period for such notice of no later than 12 hours prior to flight time.
12/14/66	E 24516	Approved Air Traffic Conference of America agreements "... designed primarily to reduce the number of 'no-show' passengers, and to minimize the possibility of selling more space than is available on particular flights, resulting in passengers with reserve space being denied boarding."
		The Board stated:
		"The agreements represent an effort to strengthen the carriers' reservations procedures on an industry-wide basis and to provide for a continuing review of results. The objectives of these procedures are noteworthy and are in keeping with the spirit and intent of earlier pronouncements by the Board on such matters. The agreements, therefore, merit approval."

Date	CAB Order/ CAB Reports	Description
1/10/67	EDR-109	In a notice of proposed rulemaking, after finding that existing compensation provided in carrier tariff was inadequate, the Board proposed to require the carriers to file tariffs on denied boarding compensation at the rate of 200% of the value of the first remaining flight coupon with a $50.00 minimum and a $200.00 maximum. The Board found, *inter alia*, that the 12 hour rule proposed by EDR-95 would require substantial changes in carrier reservations practices and carrier systems and stated it was " . . . not prepared to require such changes in a system which has, on balance, worked reasonably well in the public interest. . . . " The Board noted that EDR-95 was directed toward the practice of deliberate or controlled overbooking. The Board proposed that carriers be required to furnish oversold passengers with a statement of the terms, conditions and limitations of denied boarding compensation. It also proposed that the carriers establish priority rules for determining who shall be denied boarding on an oversold flight and that such rules must not result in unjust discrimination or undue or unreasonable prejudice or disadvantage to persons. The Board was of the view that carrier flexibility on establishing priority rules should not be disturbed. Finally, the proposed rulemaking would require monthly reports so that the Board could monitor the practices and procedures and make adjustments where necessary.
8/3/67	ER-503	Enactment of Part 250 of the Board's Economic Regulations (14 CFR 250) to become effective 10/17/67. This regulation required the following: (a) Denied boarding compensation to be paid at the rate of 100% of the first remaining coupon. (b) $25 minimum $200 maximum.

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Date	CAB Order/ CAB Reports	Description
		(c) Establishment of priority rules and criteria for determining which passengers holding confirmed reserved space shall be denied boarding on an oversold flight and that such rules must be filed with the Board. In addition the rules and criteria shall not make, give or cause any undue or unreasonable preference or advantage to any particular person or subject any particular person to any unjust discrimination, etc. (14 CFR 205.3). (d) Establishment of certain exemptions from the denied boarding compensation rules under certain conditions. (e) Required monthly result reports be filed. Note: Part 250 has been amended on occasion: *ER-588* effective 10/10/69 concerning alternate transportation provided passengers denied boarding. This rule allowed passengers an option of receiving compensation or alternate transportation when available and offered. *ER-681* effective 5/18/71 requiring public disclosure of international operations. *ER-727* effective 4/7/72 regarding administrative details concerning filings. *ER-804* effective 8/6/73 applying the denied boarding rules to confirmation of reserved space not only as shown on a passenger's ticket but by any other means of confirmation provided for in a carrier's tariff including oral confirmations. *ER-827* effective 9/11/73 expanding the applicability of the denied boarding rules to intra-Alaskan operations.

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Date	CAB Order/ CAB Reports	Description
8/23/67	E 25583	Order dismissing complaint of Warren Paul Murray against Ozark Air Lines. Murray, an overbooked, oversold passenger had alleged that the carrier failed to offer denied boarding compensation at the time and place of the oversale. He sought compensatory and punitive damages and other redress. The claims were uncontested, but the carrier alleged it had remitted compensation to the complainant which was refused. Ozark also alleged it had a policy against overbooking and that the oversale was the result of a mistake by its employees. After noting it had no authority to grant damages the Board stated that a single denied boarding incident did not warrant an enforcement complaint. It also cited its intention to consider the oversales problem "on an industry-wide basis in an effort to reach an overall solution." (EDR-109 and ER-503)
9/6/67	E 25635	Order approving an intercarrier agreement in which the Board allowed establishment of a task force to establish and coordinate technical, financial, marketing, communications and legal subcommittees to evaluate and make recommendations on a common automated reservations system. The Board stated: " . . . we believe that such a common system may tend to reduce the incidence of oversales with resulting denied boardings. . . . " (Terminated by Order 71-11-90 dated 11/24/71 due to antitrust problems involved)
6/19/70	70-6-114	Stipulation of facts and consent to the issuance of a cease and desist order entered into by Trans Caribbean Airways, Inc. in settlement of alleged violations—failure to provide passengers with notices required under Part 250.

Date	CAB Order/ CAB Reports	Description
6/24/71	71-6-120	Order dismissing complaints against conditional reservation rule proposed by Eastern Air Lines. The Board stated: "The no-show problem is essentially an industry problem, and it would be most desirable in our opinion that it be dealt with on a uniform basis." The Board went on to indicate industry-wide discussion authority would be granted if the carriers so wished.
7/19/71	71-7-99	Order authorizing discussions of Eastern Air Lines' conditional reservation rule and all possible alternative plans for attacking the no-show and related overbooking problem. The Board stated: " . . . A resolution of the no-show problem throughout the industry should also tend to reduce the number of denied boardings to passengers holding confirmed space." A meeting was held on September 15, 1971 pursuant to this Order but no agreement was reached.
7/13/72	72-7-42	Stipulation of facts and consent to the issuance of a cease and desist order entered into by Trans World Airlines for the purpose of settling an informal charge that the carriers violated the denied boarding regulations by failing to distribute information regarding payment of compensation. The Board accepted $87,000 as a compromise of any penalties which might be imposed.
6/4/73	EDR-248	Notice of proposed rulemaking amending Part 250 to include foreign air carriers. The Board reiterated that the rules were for the purpose, *inter alia*, of preventing unlawful discrimination or undue or unreasonable prejudice in connection with determining priorities among overbooked passengers and to provide "prompt, effective and adequate compensation" to passengers denied boarding.

Date	CAB Order/ CAB Reports	Description
8/1/73	73-8-1	Order rejecting proposed tariff by Western Air Lines, Inc. which would have compensated passengers for failure to provide advertised features of first-class services. Among other things the Board noted that: "... Denied-boarding compensation is tied to a very specific and readily identifiable occurrence—failure to accommodate the passenger on a flight for which he has a reservation. Moreover, the amount of compensation bears a reasonable relationship to that which the passenger has not been furnished—the dollar value of the air transportation."
12/21/73	73-12-93	Order instituting investigation; tentative findings and conclusions; notice of proposed rulemaking. This order tentatively found and concluded that airline tariffs which did not contain reservations and ticketing rules *set out by the Board* in the order will be considered to be unjust, unreasonable, unjustly discriminatory, unduly preferential, unduly prejudicial, or otherwise unlawful during the pendency of the fuel allocation program. The Board proposed a substantial increase in the denied boarding compensation to "... provide the carriers with an incentive to minimize denied boardings due to overbooking or other causes."
6/10/74	Initial Decision Docket 26253	The Initial Decision of then Associate Chief Administrative Law Judge Robert L. Park, found that the present tariff rules, regulations and practices of the carriers are not unlawful. Judge Park also found that the public interest requires a stand-by or contingent no-show control plan with certain ingredients to be implemented by the Board under certain circumstances. Judge Park suggested the need for carrier discussions before promulgation of the plan.
8/13/74	ER 880	CAB extended coverage of Part 250 to include foreign air carriers.

Date	CAB Order/ CAB Reports	Description
10/29/74	ER 890	CAB, in response to requests by numerous foreign air carriers deferred extension of denied boarding rule.
1/27/75	ER 897	CAB rendered interpretative amendment and partial stay of the extension of Part 250 to foreign air carriers.
7/11/75	75-7-54 Docket 26253	CAB notes decision of Court of Appeals in *Nader* case and requests views of any party with respect to what action the Board should take and the procedures it should follow in the pending *Emergency Reservations Practices Investigation* as a result of the remand.